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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

COLLECTED

BY JOHN DICKENS, ESQ.

THE LATE SENIOR REGISTER OF THAT COURT.

REVISED

BY JOHN WYATT,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. I.

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1803.

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TO

THE RIGHT HONORABLE

JOHN LORD ELDON,

LORD HIGH CHANCELLOR

OF

GREAT BRITAIN,

&c. &c. &c.

My Lord,

In ſoliciting permiſſion to dedicate the following Reports of Mr. *Dickens* to Your Lordſhip, I felt that I was endeavouring to accompliſh the wiſh, which he would have entertained, had he lived to publiſh them.

In condeſcending to grant my Requeſt, Your Lordſhip has ſhewn the Reſpect which You bear to the memory of the Author, and the intereſt which You take in the advancement of profeſſional knowledge: In protecting

protecting the Labours of the Dead, You encourage the Induſtry of the Living, and approve Yourſelf the Friend of Learning, and the ready Patron of Merit.

In my own Name I have to thank Your Lordſhip for the obliging manner, in which Your aſſent to my application was communicated, and to aſſure Your Lordſhip, that I have the Honor of being, with the greateſt Reſpect,

My Lord,

Your Lordſhip's much obliged,

And moſt obedient Servant,

JOHN WYATT.

Fig Tree Court, Inner Temple,
23d January 1803.

ADVERTISEMENT.

THE following Reports have been prepared from the Manuſcripts of Mr. *Dickens*, the late Regiſter of the Court of Chancery; all of them written in his own Hand, and though without order or arrangement, yet evidently with a view to Publication. They eſtabliſh many important Principles of Equity, and compriſe many Points relative to the Practice of the Court, with which the Author, from ſituation and experience, was ſo intimately acquainted.

I have not aſſumed the liberty of expunging any of the Caſes, which he thought worthy preſervation. My Object has been to reduce them to chronological order, yet in a few inſtances my diligence has been eluded. Care has been taken to add in the margin, references to the contemporary Reports. The Names of the Caſes have been prefixed; and a copious Index ſubjoined, on the

the model of the Digeſted Index in Chancery; and I flatter myſelf, that I have in ſome meaſure contributed to the utility of a uſeful Work; at the ſame time it becomes me in common juſtice to add, that I have been aided in this undertaking, by my learned Friend Mr. *Toller*, whoſe eſſential aſſiſtance demands my public acknowledgment.

A due Selection of Caſes, a correct Narration of Facts, a conciſe yet clear Statement of the Queſtion, and a perſpicuous Report of the Judgment, if I am not deceived by the partiality of an Editor, are to be found united in theſe Volumes, and will remain a laſting Monument of the Talents and Induſtry of the Author.

J. W.

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OATHS, FORMS, &c.

OF THE

HIGH COURT OF CHANCERY.

PRINCE OF WALES.

WHEN His Royal Highneſs THE PRINCE OF WALES, (afterwards King *George* II.), took the oaths, the Lord Chancellor met him in the Court of Requeſts, and waited upon him into Court; Mr. Juſtice *Eyre*, Chancellor to the Prince, held the book, when he took the oaths; which were read by the Maſter of the Rolls; and then the Lord Chancellor waited upon the Prince to the end of the Hall, after which the Lord Chancellor returned into Court.

The Lord Chancellor ſat covered during the time the oaths were adminiſtered; the Bar ſtood.

THE DUKE OF CUMBERLAND.

On the 16th *June* 1755, the Lord Chancellor, *Hardwicke*, having received notice, that

his Royal Highneſs *William* Duke of *Cumberland*, intended this day to come into Court, to take the oaths upon his being appointed one of the Lords Regents; his Lordſhip, on the approach of his Highneſs, met him at the ſteps leading from the Hall to the Court; and being come into Court, his Highneſs took the oaths; his Lordſhip ſitting covered, the Bar ſtanding: the Maſter of the Rolls, who attended for the purpoſe, read the oaths; the ſenior Maſter held the Evangeliſts. After which, the Lord Chancellor took up the purſe, and attended his Highneſs down the ſteps into the Hall.

THE LORDS COMMISSIONERS OF THE GREAT SEAL.

On the 23d *November* 1756, the Lords Commiſſioners for the cuſtody of the Great Seal took the oaths. Mr. *Eld* the ſenior Maſter for that day, held the book; the Deputy Clerk of the Crown adminiſtered the oaths.

After

After which, Mr. Solicitor General moved, that the taking of the oaths by the Lords Commiſſioners might be recorded by the Clerk of the Crown: Which was ordered.

The like motion and order are made upon the Lord Chancellor, the Lord Keeper, or a Serjeant at Law taking the oaths. When Lord *Loughborough*, Sir *William Aſhburſt*, and Sir *Beaumont Hotham*, the Lords Commiſſioners, took the oaths on the 7th *May* 1783, the ſame rule was obſerved. They alſo took the qualifying oath; a clerk of the Petty Bag read the oaths, the Maſter held the book.

PEERS.

When Peers take the oaths in Court, one of the Officers of the Court, generally the Deputy Uſher, holds the book, while a Deputy of the Clerk of the Crown reads the oaths.

The Lord Chancellor ſits covered during the Time the Peers are in Court, except at their coming into, and going out of Court; when he riſes, and bows to them.

THE LORD CHANCELLOR AND LORD KEEPER.

On the 1ſt day of *Michaelmas* Term 1705, Lord *Cowper* was ſworn in Keeper of the Great Seal; Sir *John Trevor* Knight, Maſter of the Rolls, held the book, when the oaths were adminiſtered.

On the 3d day of *June* 1725, Lord *King* was ſworn Chancellor; the Maſter of the Rolls held the book.

When the Lord Keeper *Henley*, afterwards Lord Chancellor *Northington*, took the oaths in Court; Sir *Thomas Clarke* Knight, Maſter of the Rolls, held the book.

On

On the 1ſt day of *Trinity* Term 1778, when Lord Chancellor *Thurlow* took the oaths in Court, Sir *Thomas Sewel* Knight, Maſter of the Rolls, held the book.

The ſame mode was obſerved the 23d day of *January* 1784, upon Lord *Thurlow's* reſuming the office of Lord Chancellor.

The oaths are, of allegiance, ſupremacy, and of office.

On the 14th *June* 1786, the Lord Chancellor being ill, the Maſter of the Rolls ſitting for him, heard the petitions in cauſes preferred to his Lordſhip; the propriety of which had been doubted; but, upon conſideration, his Lordſhip was clear that the Maſter of the Rolls might hear a petition as well as a cauſe ſet down in his Lordſhip's paper of cauſes; all bills being in the nature of petitions, and addreſſed to the Great Seal; but as to lunatic, and bankrupt petitions, the Lord Chancellor acted as to them under ſpecial delegation.

The

The trial of *Warren Haſtings* Eſquire, upon an impeachment by the Houſe of Commons, being proceeded on, in a temporary Court erected in *Weſtminſter* Hall for the purpoſe; whereby the ſeveral courts, particularly the Court of Chancery, could not conveniently ſit in their reſpective courts:

This court adjourned from *Weſtminſter*, and ſat in *Lincolns-Inn* Hall.

The ſame was done by the Lord *Northington* C., when the Earl of *Ferrers* was tried for murder.

The 24th day of *June* 1791, being the firſt day of *Trinity* Term, and being *Midſummer* Day, it was doubted whether the courts could ſit; but an inſtance being found in the year 1709, all the Courts did ſit on that day.

On the 29th *January* 1793, Lord *Loughborough* took the oaths in the Court of Chancery, Sir *Pepper Arden* Knight, Maſter of the Rolls, held the Evangeliſts, and the Deputy Clerk of the

the Crown read the oaths. He was attended into Court by Lord Viſcount *Stormont*, the Earl of *Carliſle*, the Earl of *Buckinghamſhire*, Lord *Darnley*, Lord *Malmſbury*, Lord *Beauchamp*, the Right Honourable *William Pitt*, Chancellor of the Exchequer, the Right Honourable *Henry Dundas*, one of the Secretaries of State, and the Right Honourable *Welbore Ellis*.

Note. The Maſter of the Rolls kept on his hat at the time he held the book.

In the vacation, on the 14th *April* 1801, Lord *Loughborough* C. reſigned the Great Seal, which was immediately delivered by His Majeſty to Lord *Eldon*, Chief Juſtice of the Court of Common Pleas, as Lord High Chancellor of *Great Britain*. His Lordſhip continued to preſide in the Court of Common Pleas, until the appointment of his ſucceſſor Lord *Alvanley*, which took place after *Eaſter* Term. On the 15th *April*, the Lord Chancellor held the firſt Great Seal before the Term.

A LIST

A LIST OF THE LORD CHANCELLORS, LORD KEEPERS, and LORDS COMMISSIONERS of the GREAT SEAL OF GREAT BRITAIN,

WITH THE DATES OF THEIR RESPECTIVE APPOINTMENTS, FROM THE YEAR 1530.

1530. Oct. 25.	Sir Thomas Moore	Lord Chancellor.
1533. May 20.	Sir Thomas Audley afterwards	Lord Keeper, Lord Chancellor.
1545. May 30.	Earl of Southampton	Lord Chancellor.
1547. June 29.	Lord St. John, afterwards Marquis of Winton	Lord Keeper.
1547. Nov. 30.	Sir Richard Rich	Lord Chancellor.
1551. June 19.	Richard Goodrick, Biſhop of Ely	Lord Keeper.
1553. Sept. 21.	Stephen Gardiner, Biſhop of Wincheſter	Lord Keeper.
1555. Jan. 1.	Nicholas Heath, Archbiſhop of York	Lord Chancellor.
1559. April 4.	Sir Nicholas Bacon	Lord Keeper.
1579. April 25.	Thomas Bromley	Lord Chancellor.
1587. April 29.	Sir Chriſtopher Hatton	Lord Chancellor.
1592. May 29.	Sir John Pickering	Lord Keeper.
1596.	Lord Treaſurer Burleigh, and others	Lords Commiſſioners.
1596. May 6.	Sir Thomas Egerton, M. R. afterwards Lord Eleſmere	Lord Keeper. Lord Chancellor.
1616. Mar. 11.	Sir Francis Bacon afterwards Lord Verulam	Lord Keeper. Lord Chancellor.

1621. May. 3.	Lord Mandeville Duke of Richmond Viſcount Pembroke Sir Julius Cæſar, M. R.	Lords Commiſſioners.
1621. July 10.	John Williams, Biſhop of Lincoln	Lord Keeper.
1625. Nov. 1.	Sir Thomas Coventry afterwards Lord Coventry	Lord Keeper.
1639. Jan. 23.	Sir Thomas Finch	Lord Keeper.
1640. Jan. 23.	Sir Edward Littleton	Lord Keeper.
1645. Aug. 30.	Sir Richard Lane	Lord Keeper.
1653. 5 Car. II.	Sir Edward Herbert	Lord Keeper.
1657. Jan. 13.	Sir Edward Hyde afterwards Lord Clarendon	Lord Chancellor.
1667. Aug. 13.	Sir Orlando Bridgman	Lord Keeper.
1672. Nov.	Earl of Shafteſbury	Lord Chancellor.
1673. Nov. 17.	Sir Heneage Finch afterwards	Lord Keeper.
	Lord Nottingham	Lord Chancellor.
1682. Dec. 13.	Sir Francis North afterwards Earl of Guildford	Lord Keeper.
1685. Oct. 28.	George Lord Jefferys	Lord Chancellor.
1688. - -	Sir John Maynard Anthony Keck Serjeant Rawlinſon	Lords Commiſſioners.
1690. June. -	Sir John Trevor Sir William Rawlinſon Sir George Hutchins	Lords Commiſſioners.
1693. March.	Sir John Somers afterwards	Lord Keeper.
	Lord Somers	Lord Chancellor.

1700.

1700.	The Three Chiefs	Lords Commiſſioners.
1700.	Sir Nathan Wright	Lord Keeper.
1705. Oct. 23.	William Cowper, Eſquire afterwards Lord Cowper	Lord Chancellor.
1711. Oct. 19.	Sir Simon Harcourt afterwards Lord Harcourt	Lord Keeper. / Lord Chancellor.
1714.	Earl Cowper	Lord Chancellor.
1718. May 12.	Lord Parker afterwards Earl of Macclesfield	Lord Chancellor.
1725. Jan.	Sir Joſeph Jekyl, M. R. Juſtice Raymond Baron Gilbert	Lords Commiſſioners.
1725. June 3.	Lord King	Lord Chancellor.
1733. Nov. 29.	Lord Talbot	Lord Chancellor.
1736. Feb. 21.	Lord Hardwicke afterwards Earl Hardwicke	Lord Chancellor.
1756. Nov. 23.	Sir John Willes Lord Chief Juſtice, C. P. Juſtice Wilmot Mr. Baron Smith	Lords Commiſſioners.
	Sir Robert Henley afterwards Earl of Northington	Lord Keeper. / Lord Chancellor.
1755. July 16.	Pratt, Lord Camden	Lord Chancellor.
1769.	Sir Sidney Stafford Smith, Chief Baron of Exchequer Juſtice Bathurſt Juſtice Aſton	Lords Commiſſioners.
1771. Jan. 22.	Bathurſt, Lord Apſley afterwards Earl Bathurſt	Lord Chancellor.

1778. June 3.	Thurlow, Lord Thurlow -	Lord Chancellor.
1783. April 9.	Lord Loughborough Chief Juſtice, C. P. - - Sir William Aſhhurſt - - Mr. Baron Hotham - -	Lords Commiſſioners.
1783. Dec. 23.	Lord Thurlow again - - and reſigned the Seals 15th June 1792.	Lord Chancellor.
1792. June 15.	Lord Chief Baron Eyre - Sir William Aſhhurſt, one of the Judges of K. B., and Sir John Wilſon, one of the Judges of the Common Pleas - - -	Lords Commiſſioners.
1793. Jan. 28.	Lord Loughborough C. J. C. Pleas.	Lord Chancellor.
1801. April 14.	Lord Eldon C. J. C. Pleas -	Lord Chancellor.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Bull v. *Bodie.*

(Lib. Reg. A. fol. 263.)

2 & 3 *Eliz.* A. D. 1559.

Injunction to ſtay a party from proceeding at law for land, where a bill brought by him *merely* to recover the ſame land, was depending in Chancery.

ENTRY of an injunction to ſtay the defendant's proceedings at law ſtates, that the defendant, *John Bodie*, had preferred a petition in Chancery againſt the plaintiff *Robert Bull*, and one *James Young*, his then tenant, for recovery of four tenements in *Wellington*, in the county of *Somerſet*, which the plaintiff ſtated to have come to him as heir of the body of *Lucy Bodie*, under an entail created by the will of *John Cumberſbat*; and that an anſwer had been put in by the ſaid *Robert Bull* and *James Young*, by which *Bull* diſclaimed as to two tenements, but as to the others ſaid, they did not paſs by the will, but deſcended to the teſtator's two ſiſters, his co-heireſſes at law; that they made a partition,

Bull v. *Bodie.*

by which one was allotted to one ſiſter, (whoſe heir at law was the defendant *Bodie*), and that the other was allotted to *Joanna* the other ſiſter, the wife of *Robert Taylor*; that ſhe entered, and enjoyed, and the ſame deſcended to *Joanna Taylor*, her heireſs at law, and that the plaintiff *Bull* purchaſed of *Thomas* the heir at law of the ſaid *Joanna Taylor*, and was in poſſeſſion.

The injunction then ſtates, that after the petition ſo preferred, the ſaid *John Bodie* had brought an ejectment againſt the preſent plaintiff *Robert Bull*, and *Thomas Gyfford* his tenant, for recovery of the ſaid premiſes; that the ſuit inſtituted by the ſaid *John Bodie* in Chancery as aforeſaid remained undecided: That the proceedings at law were in contempt, and derogatory to the juriſdiction of the Court of Chancery, the aforeſaid matter in Chancery being there undetermined.

And therefore the Court ſtaid the proceedings at law, till the aforeſaid matter in Chancery ſhould be diſcuſſed and determined.

Bagnold v. *Green.*

(Lib. Reg. A. fol. 1788.)

2 & 3 *Eliz.* A. D. 1559. Carey's Rep. 48 S. C.

A ſuggeſtion that if certain perſons ſhould die, their death would be very prejudicial to the plaintiff's title, commiſſion iſſued to examine them, although the defendant had not anſwered.

UPON ſuggeſtion merely, *there being no affidavit*, that if certain perſons ſhould die, their death would be very prejudicial to the plaintiff's title, a commiſſion iſſued to examine witneſſes on the part of the plaintiff, although the defendant had not anſwered.

William Wild and Edith his Wife, Plaintiffs;
Thomas Wells, Defendant.

25 & 26 *Eliz.* A. D. 1583.

(Lib. Reg. B. fol. 112.)

Bill to have dower ſet out, and for arrearages. Vid. 1 Fonbl. 22. 2d. edit.

FORASMUCH as upon the hearing of the matter touching the dower demanded by the plaintiffs in right of the plaintiff *Edith* out of the lands of *Leonard Fulks*, her former huſband, it appeared ſhe ought to be endowed of the ſame lands according to the petition of the bill, and the defendant was nevertheleſs (as by an order (*a*) of the 19th of *October* laſt, appeareth) to be adviſed for a time, and give anſwer to this Court, whether he would give the plaintiff 10 *l.* in recompence of the ſaid dower, and of the arrearages, or elſe would give the plaintiff 4 *l.* for the arrearages, and ſuffer the ſaid petitioners to have their dower ſet out by commiſſioners; and for that alſo the ſaid defendant hath not hitherto given any anſwer thereof to the Court, it is ordered, that a ſubpœna be awarded againſt the defendant to ſhew cauſe by *Wedneſday* come ſen'night, wherefore a decree ſhould not be made for the plaintiff for the ſaid lands, and tenements, which they demanded in dower, and for all the arrearages thereof, and wherefore a commiſſion ſhould not be awarded for ſetting out the ſame, or in default of ſuch cauſe to be ſhewed, the ſame ſhould be decreed accordingly.

(*a*) I ſearched the books but could not find any entry of it. *John Dickens.*

May 1612.
Toth 66. S. C.

Bates v. *Heard.*

(Reg. Lib. fol. 864).

Spoliation of marriage articles made good.

UPON the marriage of the plaintiff with *Elizabeth* the daughter of the defendant *Thomas Heard* the elder, an agreement was entered into, by which the plaintiff was to have 100*l.*; and if the defendant *Thomas* the ſon died in the life time of his father, without iſſue male, the father covenanted to leave the plaintiff and his wife one moiety of his lands, &c. in fee; and if *Thomas*, the ſon, ſhould leave iſſue male, then *Thomas*, the father's heirs, executors or adminiſtrators were to pay the plaintiff 300*l.* within one month after the death of the father.

The bill charged that the defendants had cozened the plaintiff to procure the agreement, and to deliver it to them, and prayed the benefit of it.

The defendants, by their anſwer, denied there was any ſuch agreement.

But it appearing from the depoſitions that ſuch agreement was ſealed, and delivered to the plaintiff: It was ordered, that if the defendant, *Thomas Heard*, the ſon, died in the life time of his father, without iſſue male, the plaintiff and his wife ſhould quietly hold, and enjoy one moiety of the lands, &c. according to the true intent and meaning of the agreement; but if *Thomas* the ſon, or iſſue male of him ſhould ſurvive *Thomas* the father, the heirs, executors or adminiſtrators of *Thomas* the father, ſhould, within one month after his death, pay unto the plaintiff 300*l.*

Arnold

Arnold v. *Barrington.*

24 Nov. 1631.

(Reg. Lib. fol. 864.)

Bond for performance of a promiſe to make a ſettlement having been cancelled by the obligor, he was ordered to ſettle lands agreeably to the bond.

JOHN *Arnold*, the plaintiff's brother, being ſeiſed of copyhold lands, and having iſſue two daughters, *Elizabeth* and *Catherine*, and intending to make a proviſion for *Elizabeth*, his eldeſt daughter, ſurrendered part of the lands to the uſe of the ſaid *Elizabeth*, and other part thereof to *Thomas Barrington* for payment of his debts, and the reſidue being of the value of 500*l.*, he left unſurrendered to deſcend to *Catherine* his youngeſt daughter as heir by the cuſtom of the manor: After the ſurrender, *John Arnold* made his will whereby he confirmed the ſurrender, and directed the plaintiff to have the care of the marriage of his daughter, and appointed him executor.

Afterwards, a clandeſtine marriage was effected between the defendant *Walter Barrington*, and the ſaid *Catherine*; and, upon the marriage, the defendant *Walter Barrington* promiſed to make a jointure of lands of 60*l.* a year, and entered into a bond to the defendant *Catherine* in the penalty of 1000*l.* for performance of the agreement.

Some time after the ſaid *Walter Barrington* and *Catherine* cancelled the bond.

The plaintiff filed his bill to have the benefit of the bond, ſtating that no proviſion was made for *Catherine*, and in caſe of the death of *Walter Barrington* ſhe would be left deſtitute.

Arnold v. *Barrington.*

Upon reading the anſwer, it appeared the marriage was had, and the promiſe made, and the bond given, and afterwards cancelled.

It was decreed that the defendant *Walter Barrington* ſhould by *Wedneſday* then next, convey lands in fee ſimple worth 60*l.* a year, free from incumbrances, unto truſtees for the ſaid *Catherine*, in lieu of jointure, for her life.

Snelling v. *Flatman.*

A. D. 1631.

(Reg. Lib. fol. 431).

A defendant againſt whom a ſupplicavit had iſſued, complaining the articles to ground it, were not ſufficient, and producing a certificate of his good behaviour, the Court referred it to the two next juſtices of the peace in the neighbourhood, to enquire into it.

A SUPPLICAVIT againſt the defendant; he took exceptions to the articles as not being ſufficient on which to ground a ſupplicavit, they being too general; and produced a certificate of his good behaviour: the plaintiff averred the contrary.

The Court ordered the two next juſtices of the peace in the neighbourhood, to call the ſaid parties before them, and to examine into the truth of the articles, and the certificate, and that the queſtion of the ſupplicavit ſhould be ſtayed in the mean time.

Lewis v. *Owen.*

7 Nov. A. D. 1637.
Toth. 112. S. C.

Before publication, new interrogatories may be exhibited to new witneſſes, though a joint commiſſion hath been executed.

THE queſtion was, whether after a joint commiſſion executed, new interrogatories might be exhibited to new witneſſes.

The Maſter of the Rolls, upon a conference with the Lord Chancellor, was of opinion, that new interroga-

tories

tories might be exhibited into Court for the examination of new witneſſes at any time before publication, although there had been a joint commiſſion executed. *Lewis* v. *Owen*.

Emmerſon v. *Dalliſon*.

(Reg. Lib. A. 30.)

6 March 1660. 3 C. R. 194. S. C.

COSTS, under an order to expunge ſcandal out of a bill, and tax coſts, were taxed at 100*l.* upon exceptions they were reduced to 50*l.* A bill of indemnity having paſſed, the plaintiff applied to be diſcharged from the payment.

Coſts for ſcandal in a bill taxed at 100l. reduced on exceptions to 50l. an act of indemnity held not to exempt the plaintiff from the payment of them.

Lord *Clarendon*, C., aſſiſted by the judges, determined he was not exempted by the act from the payment.

Inglet v. *Vaughan*.

(Reg. lib. A. 476.)

15 Car. II. A. D. 1663. 1 C. R. 261. S. C.

A QUESTION aroſe upon a commiſſion of rebellion for not performing a decree, whether bail ought to be taken? Upon reference, it was held to be in the diſcretion of the Commiſſioners; but if they refuſed, they ought to bring the party into Court without delay.

Commiſſioners on a commiſſion of rebellion have it in their diſcretion to take bail of a perſon for not performing a decree.

Cranbourne v. *Dalmahoy.*

(Reg. Lib. A. fol. 519.)

14 Car. II. 2 Freem. 169. S. C.

If a feme marry, pending a ſuit, and the cauſe proceed, and a decree be made, it is not a ground to reverſe the decree.

IF a feme, pending the ſuit, marries, and the cauſe proceeds, and a decree is made, this is not ſufficient to reverſe the decree. And ſo it was held by the Lord Chancellor, aſſiſted by the judges, on a plea to a bill of review on that ground, who ſaid, that marriage was a matter of abatement only, not of right, and was matter of fact out of the decree.

Williams v. *Owen.*

24 June 16. Car. II. A. D. 1674. 1 C. C. 56. S. C. 2 Eq. Ca. Abr. 174. S. C. 2 Freem. 181. S. C.

On demurrer to anſwer to bill of review and ſupplemental bill to carry a former decree into execution, which wanted to draw into queſtion, and have a new examination of the decree, it was ordered that no matter ſhould be re-examined.

BILL of review, and ſupplement to carry a former decree into execution. The defendants anſwer, and thereby wanting to draw into queſtion, and have a new examination of the matters in the decree, the plaintiff demurred to the anſwer on that ground. On arguing the demurrer, it was ordered by Lord *Clarendon*, C., that no matter ſhould be re-examined.

Sir William Waller, Knt. v. *Dalt.*

(Reg. Lib. B. fol. 518.)

2 May, A. D. 1676. 1 Eq. Ca. Abr. 90. S. C. 1 C. C. 276. S. C. Finch. C. R. 295 S. C.

Improvident young men relieved againſt bonds, and judgments executed by them through fraud on re-paying the money really and *bona fide* advanced to them.

THE bill ſtates, that about fourteen years ſince, the plaintiff and *Robert Thomas*, and *Robert Rayner*, being then all young men, agreed to take up upon their joint ſecurity 500*l.*, which one *Wilſhire*, a near kinſman of the defendant, did, by the defendant's direction, agreed to furniſh them with in

ready

ready money. Ameeting was appointed; they met, and *Wilſhire* produced, ready engroſſed, two bonds, with warrants of attorney to confeſs judgment, to the defendant, one in 300 *l.*, the other in 200 *l.*, and the money he affirmed was juſt coming, and deſired them to execute the bonds and warrants of attorney in the mean time; which they did, and delivered for the uſe of the defendant, whom they had never ſeen, or before heard of, but who was made obligee in the bonds; and the bonds and the warrants of attorney were laid on the table, there to remain till the money was brought: But *Wilſhire* privately took them away, and ſent them to the defendant without any money being paid. At a ſubſequent meeting, *Wilſhire* pretended, there was a diſappointment in procuring the money, and propoſed a parcel of ſilk in lieu of it, which was of equal value, (but did not produce it), and undertook to ſell the ſame, and to pay them the money ariſing from it; that he afterwards paid to them 200 *l.*, which he alleged was all the money received from the ſale, and which was all the co-obligors received as a conſideration for their bonds, and warrants of attorney; that *Wilſhire* promiſed to deliver up the ſecurities upon payment of 200 *l.* and intereſt; they reſted ſatisfied; but *Wilſhire* afterwards dying, the defendant ſued the plaintiff upon the bonds, and judgments for 1000 *l.*; and the other co-obligors having withdrawn themſelves, and refuſing to join with the plaintiff, the plaintiff filed his bill ſtating as above, and praying that on payment of 200 *l.* and intereſt, the bonds might be delivered, and the judgments aſſigned to the plaintiff. The defendant, by his anſwer, ſaid he was an utter ſtranger to the tranſaction between the

Walker v. *Dalt.*

the co-obligors and *Wilſhire*; but being informed by one *Willis*, who was a ſilk throwſter, that the plaintiff, and the other obligors had occaſion for a parcel of ſilk, and would deal for a good quantity, at a meeting between them and *Wilſhire* (the defendant reſolving not to part with the ſilk without ſecurity), they executed a bond dated the 24th of *December* 1660, in the penalty of 600 *l.* for payment of 300 *l.*, with a warrant of attorney to confeſs judgment; and thereupon he delivered to the co-obligors a parcel of ſilk of the value of 300 *l.*; and they being ſatisfied therewith, and wanting 200 *l.*, they executed to him another bond, dated the 17th of *December* 1660, for 200 *l.*, with a warrant of attorney to confeſs judgment, and thereupon he delivered to them another parcel of ſilk to the value of 200 *l.*; that *Wilſhire*, *Willis*, and *Rayner* were ſince dead, and the monies not being paid, he had cauſed judgment to be entered up, and the plaintiff being the only ſolvent obligor, the defendant had ſued him for the money ſecured by the bonds; the ſilks ſold by the defendant being worth the full of the money ſecured at the time they were delivered, and therefore he inſiſted he ought to have the benefit of the ſaid ſecurities.

On the part of the plaintiff, it was inſiſted, that he was drawn into the ſaid ſecurities by fraud and contrivance between the defendant, and the ſaid *Wilſhire*, and on promiſe of 500 *l.* to be lent, which never was lent.

Upon debate, and hearing the proofs, it was decreed, that on the plaintiff's paying the ſum of 200 *l.* at midſummer day then next, and 80 *l.* for intereſt, making together 280 *l.*, by the firſt day of Term, the bonds ſhould

ſhould be delivered up, and the judgments aſſigned to the plaintiff at his expence, in order that he might be reimburſed by his co-obligor; and in default, the injunction granted in the cauſe was to be abſolutely diſſolved. *Waller* v. *Dale.*

The decree is ſilent as to coſts.

Garland v. *Radcliffe.*

(Reg. Lib. fol. 224.)

10 Nov. 1676.

THE bill was for diſcovery, and to be relieved upon an agreement, between *Ann Buller*, the mother of the plaintiff *Elizabeth*, and *Peter Radcliffe*, ſon of the defendant *Peter Radcliffe*, upon a marriage to be then had between the ſaid *Peter* the ſon, and the ſaid *Elizabeth*; and to have the lands decreed to the plaintiff *Elizabeth*, according to the ſaid agreement, and a ſettlement made in purſuance of it; and for an account of the rents and profits of the lands ſettled on *Peter* the ſon, accrued ſince the death of *Peter* the ſon. Deeds deſtroyed.—Plaintiff decreed to hold and enjoy.

The bill ſtated, that *Peter Radcliffe* the father, and *Peter* the ſon, being ſeiſed of lands, and entitled to ſettle them, in *March* 1661, a treaty of marriage was ſet on foot between *Peter* the ſon, and the plaintiff *Elizabeth*; and in conſideration of 500 *l.*, the portion of the ſaid *Elizabeth*, lands were agreed to be ſettled; that the marriage was had, and the 500 *l.* were paid; and by indenture dated about of *Car.* 2, the lands were ſettled, as to ſome of them, to the uſe of *Peter* the father for life, to his wife for life, remainder to *Peter* the ſon in fee: And as to the reſt of the eſtate, to the uſe of *Peter* the ſon in fee; *Peter*

Garland v. *Radcliffe.*

ter the father by will deviſed his eſtate to his wife for life; then to his daughter the plaintiff *Ann*, an infant.

Peter the ſon entered on all the lands, except thoſe limited to his father, and mother for their lives.

The limitatations not being ſufficiently expreſſed according to the agreement; it was agreed a new deed ſhould be prepared, and executed according to the agreement.

Peter the ſon being ill of the ſickneſs, of which he died, truſted the old deed with his attorney, with orders not to deliver it, until the new deed was executed.

Peter the father being a priſoner in *Derby* Gaol, having got the old deed, and the intended new deed into his cuſtody, refuſed to execute the new deed, or to deliver the old one.

Shortly after, *Peter* the ſon died, ſeiſed and poſſeſſed of the eſtates limited to him by the firſt deed, of which he received the rents: And after his death, *Elizabeth* his widow entered, and was poſſeſſed of the ſame for three months.

Peter the father having, as before ſtated, got poſſeſſion of the old deed, and cancelled it, by contrivance of a ſervant of the plaintiff *Elizabeth*, got into the houſe, and deſtroyed all the writings, &c.

The plaintiff *Garland* intermarried with *Elizabeth* the widow of *Peter* the ſon, but for want of the deeds could not bring an ejectment.

Peter the father admitted the marriage of his ſon with the plaintiff *Elizabeth*, but ſaid his ſon, and *Elizabeth* his wife had no right to the eſtate: He denied the knowledge of any ſettlement; and ſaid, he hoped

to

to prove, that if ſuch there ever were, neither he, nor his ſon had power to ſettle the lands, and claimed the ſame under a former ſettlement. *Garland* v. *Radcliffe.*

The defendant *Coply*, the truſtee, admitted himſelf a truſtee in the ſettlement; ſaid he was willing to act, but had not the deed in his cuſtody.

The Lord Chancellor being ſatisfied there had been ſuch a deed; ordered the plaintiffs *Garland* and *Elizabeth* his wife, to hold the lands agreed to be ſettled in poſſeſſion, during the life of the plaintiff *Elizabeth*; and the daughter to hold the ſame, as well thoſe in poſſeſſion as in reverſion, after the death of the defendants *Peter* the elder and his wife, to her and her heirs; and *Peter Radcliffe*, and *Henry Radcliffe* his ſon, to execute a new deed.

And the Maſter to take an account of the rents, and profits of the eſtates limited to *Peter*, the ſon in poſſeſſion.

Pavie v. *Acourt.*

18 Jan. 28, 29 Car. 2. A. D. 1678.

THE defendant, the huſband, put in a plea in the name of himſelf, and his wife, and ſwore to the plea; the wife refuſed to ſwear: The plea allowed by Lord *Nottingham* C. to ſtand as to the huſband.

Wakelyn v. *Wathill.*

8 Dec. 1679.

LORD *Nottingham* C.—A plaintiff may revive, when the time for the defendant to anſwer is out, the bill praying, that he may ſhew cauſe why the ſuit ſhould

Plaintiff may revive when the time for anſwering is out, but the defendant is debarred from making his defence.—Craven v. Craven, 12 Dec. 1711: Lord Harcourt C. S. P.

Wakelyn v. *Wakhill.*

ſhould not be revived; but though it ſhould be ordered to be revived, it doth bar the defendant from making his defence.

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32 Car. 2. 2 C. R. 193. S. C.

Glenham v. *Stutwell.*

(Reg. Lib. A. fol. 755.)

Demurrer to a bill of revivor for coſts only, which were taxed, allowed; becauſe the decree was not inrolled.

THE plaintiff, a feme covert, filed her bill againſt the defendant her huſband, and others: Her claim was decreed with coſts. The coſts were taxed, and a writ of execution ſerved: Before the coſts were paid, the plaintiff the wife died; the defendant her huſband obtained letters of adminiſtration to his wife, and filed a bill of revivor for the coſts only: The defendant demurred, and the demurrer was allowed, becauſe the decree was not inrolled.

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9 June 1680.

Lord *North* v. Lord *Gray.*

BILL to perpetuate the teſtimony of witneſſes to a deed, which the bill ſtated to be loſt, or in the hands of the defendant.—Demurrer, for that there was no impediment to the plaintiff's trying his right at law: The demurrer was allowed.

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28 Feb. 1682. 2 Eq. Ca. Ab. 23. 2 C. C. 135. S. C.

Leake v. *Morris.*

(Reg. Lib. B. fol. 360.)

Plea of ſtatute of frauds, to a bill for performance of an agreement ordered to anſwer on that charge.

THE matter upon the plaintiff's bill, and the defendant's plea and demurrer put in thereto, coming by parol, but which the bill charges was to be put into writing; the defendant

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ing on this preſent day to be heard and debated before the Lord Keeper (*a*) of the Great Seal of *England*, in the preſence of counſel learned on both ſides, the ſcope of the plaintiff's bill being, amongſt other things, to be relieved upon an agreement touching an aſſignment of a leaſe and goods, where the defendant pleaded the ſtatute of frauds, and perjuries, for that if any ſuch agreement was made, it was by parol; but the plaintiff's counſel inſiſting that the plaintiff doth by his bill ſet forth that it was agreed that the agreement ſhould be put into writing: Upon opening, and debate of the matter, and hearing of what could be alledged, his Lordſhip doth order that the defendant do anſwer ſo much of the plaintiff's bill only, as doth charge, that the ſaid agreement was to be put into writing: And after ſuch anſwer put in, the plaintiff may reply and proceed in his cauſe as he ſhall be adviſed; but the benefit of the ſaid plea, and demurrer is hereby ſaved to the defendant to the hearing of the cauſe; when, if the plaintiff ſhall be relieved, this Court will give ſuch directions touching the defendant's being examined upon interrogatories, as to this Court ſhall ſeem meet.

Leake v. *Morris.*

(*a*) Lord North.

Neal v. *Robinſon.*

7 Nov. 1683.

(Reg. Lib. B. B. fol. 168.)

BILL of review reheard.

Whitlock

3 May 1686.
2 Ch. R. 386.
S. C.

Whitlock v. *Marriot.*

(Reg. Lib. B. fol. 700.)

ANSWER reported ſcandalous. Exceptions to the report. Upon arguing the exceptions, the defendant was fined 100 *l.*, and his ſolicitor, who had forged the council's name 20 *l.* and committed until payment.

19 June 1671.
Nel. C. R. 147.
S. C. 3 C. R. 65. S. C. Vid. alſo Temple v. Rouſe. 2 C. C. 7. S. P.

Lloyd v. *Powis.*

THE plaintiff brought his bill againſt the defendant's father for land, and revived it againſt the defendant as heir, and afterwards the bill was diſmiſſed with coſts.

The queſtion was, whether the defendant ſhould have the coſts expended by his father before the revivor: And it was ruled he could not, for they died with the perſon.

19 Nov. 1690.
Eq. Ca. Ab. 277. S. C.
2 Vern. 192.
S. C.

Audley v. *Audley.*

(Reg. Lib. A. fol. 69.)

THOMAS *Audley*, the plaintiff's brother by the half blood, being found a lunatic, Sir *Geo. Audley* his father, and Lord *Cornwallis*, and others were appointed his committees. The father dying in 1666, the lunatic thereupon became entitled to eſtates, partly under the ſettlement on the marriage of his father

The committee of a lunatic's eſtate hath not power, by purchaſing real eſtate with the ſavings, to alter the nature of the property, and lands ſo purchaſed will be conſidered as perſonal eſtate.

father and mother, and other eſtates, which deſcended, of the yearly value of 2000 *l.* There being very conſiderable ſavings from the rents, after paying for the lunatic's maintenance, the committees laid out 9,700*l.*, part of ſuch ſavings, in a purchaſe of lands contiguous, and convenient to the lunatic's eſtate, and took the conveyance to the lunatic in fee. *Audley* v. *Audley*.

The bill was filed by the plaintiff, his brother by the half blood, and one of the lunatic's next of kin, to have the eſtate ſo purchaſed, with the ſavings, conſidered as the perſonal eſtate of the lunatic; and it was argued, that it was not in the power of a committee to alter the nature of a lunatic's eſtate.

After long debate by the Attorney General, and Solicitor General and other counſel, before the Lords Commiſſioners Sir *John Trevor*, Sir *William Rawlinſon*, and Sir *George Hutchins*, the Court declared the committee of a lunatic had not power to alter the nature of a lunatic's property, and that the laying out of the lunatic's money in the purchaſe of lands did not in any manner alter the property thereof, and that the plaintiff, as brother of the half blood of the lunatic, was entitled to one third part of the money ſo laid out in the purchaſe of lands, and alſo to one third part of all other the perſonal eſtate of the ſaid lunatick, and the Maſter was to enquire, whether the eſtate purchaſed was, at the time of the purchaſe, worth the money paid for it.

3 March 1702.

Mineve v. *Row.*

BOTH ſides had joined in a commiſſion, and the defendant had commiſſioners preſent when it was executed, but had not interrogatories, therefore could not examine. He this day moved for a new commiſſion, and to examine his witneſſes, and produced an affidavit, that he had neither ſeen, nor knew the contents of the depoſitions; but it was refuſed.

Michaelmas 1702.

Hayne v. *Hayne.*

A WILL having been deſtroyed by the brother of the diſinherited heir, the deviſee was decreed to hold and enjoy, and a trial was denied.

25 Feb. 1705. Lord Keeper Wright.

Baker v. *Holmes.*

(Reg. Lib. A. fol. 202.)

Service of ſubpœna on the mother of infants, to appear and anſwer, they being ſecreted, deemed good ſervice on the infants.

THIS cauſe came on to be heard the 16th of *May* laſt, when it was ordered to ſtand over, with liberty for the plaintiff to amend his bill by adding parties: the plaintiff did amend his bill by adding the children of one *Rudge*; but not being able to find them, and the defendant's ſolicitor refuſing to tell where they were to be found, by an order dated the 20th of *December* laſt, it was ordered, that ſervice of a ſubpœna for the infants to appear, on the defendant *Mary Rudge* their mother, ſhould be good ſervice. She

She was ſerved, and the children not having appeared, and the plaintiff not knowing where they were to be found, it was, on the motion of Mr. *Vernon*, ordered that the plaintiff ſhould be at liberty to ſue out an attachment againſt the infants to compel them to appear.

Fawcet v. *Fothergill.*

FRANCIS Calvert and others, claiming a mortgage for 1000 *l.* on the eſtates ſequeſtered, by order dated 18th *February* 1669 (entered Reg. Lib. A. fol. 396), they were to come in to be examined *pro intereſſe ſuo*, and the plaintiff was to exhibit interrogatories for that purpoſe.

By an order dated the 7th of *January* 1700 (entered Reg. Lib. A. fol. 340), on petition of the plaintiff, after ſtating that the claimants had been examined, and the depoſitions returned; it was referred to the Maſter to certify what proof the claimants had made of their pretended right.

The Maſter made his report.

The matter of the ſaid report came on to be heard 8th of *April* 1703 (entered Reg. Lib. A. fol. 206), when his Lordſhip ordered the plaintiff to reply to the examination, and the examinant was to be at liberty to examine witneſſes touching his claim, and to take out a commiſſion, wherein the plaintiff was to join if he thought fit.

Witneſſes having been examined, there was an order for ſetting the matter down to be heard on the

Fawcet. v. *Fothergill.*

report, the 26th *October* 1705, entered (Reg. Lib. A. fol. 101.)

The matter of the report, by which the Maſter found the claimant to have really and *bonâ fide* paid 400 *l.* and no more, came on to be argued. Upon debate of the matter, and hearing the exhibits, and the proofs taken in relation to the matter aforeſaid; his Lordſhip conceived the ſequeſtrators might redeem the mortgage, and directed an account as to 400 *l.*

A. D. 1706. 1 Eq. Ca. Ab. 3. S. C. 2 Vern. 548. S. C. Minſhul v. Lord Mohun. 10 Nov. 1711. S. P.

Clare v. *Werden.*

IT was held that a defendant, by his anſwer to a bill of revivor, is not to conteſt the juſtice of a decree, but only to ſhew cauſe againſt it.

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12 Feb. 1707. Lord Cowper C.

Bradley v. *Hind.*

VERDICT againſt verdict; a new trial denied.

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4 Feb. 1708.

Holmden v. *Tilly.*

A DECREE *ad computandum* inrolled, ſeveral of the anſwers being omitted; it was certified to be irregular, and held to be ſo.

Moreton

Moreton v. *Moreton.*

12 Jan. 1710. Lord Harcourt C. Bower v. Groſvenor. 5 March 1718. S. P.

COMMISSION executed after four in the afternoon of the day, on which it was returnable, held to be regular.

Price v. *Solly.*

22 Nov. 1711. Lord Harcourt C.

A DECREE obtained by ſurprize: on application by motion to diſcharge it, it was ordered that the defendant ſhould be at liberty to ſhew cauſe againſt the decree before the coſts of his default were paid, and that the whole coſts ſhould be reſerved until the time of ſhewing cauſe.

Meers v. Lord *Stourton.*

20 Dec. 1711.

ON a bill for a partition, there is no occaſion to examine witneſſes previouſly to the hearing.

The commiſſioners named in the commiſſion may examine witneſſes under the commiſſion *ore tenus*, or take their depoſitions in writing, as they think fit, and found their partition on ſuch evidence. This was affirmed by Mr. *Vernon* to be the practice.

Where a peer is to perfect an anſwer by being examined on interrogatories before a Maſter after hearing, and the like; in ſuch caſes, it is to be upon honour; but where a peer comes himſelf, and is to

2 Salk. 512. S. C. 2 Eq. Ca. Abr. 14. S. C. 1 P. Wms. 246. S. C.

Meers v. Lord *Stourton.*

make ſatisfaction to a party, or the bill is for diſcovery of deeds, or the like, it muſt be upon his oath; and ſo it was held on motion the above day, Lord *Stourton* inſiſting it ought to be upon honour.

16 July 1712. Lord Cowper C.

Robert v. *Millechamp.*

(Reg. Lib. 386.)

The depoſitions of witneſſes taken under a commiſſion, the title of which was miſtaken, ordered to ſtand, and the miſtake to be ſet right.

THE plaintiff ſued out a commiſſion; the defendant's commiſſioners joined, and ſigned the plaintiff's interrogatories, and witneſſes were examined on the part of the plaintiff, and the defendant's commiſſioners ſigned the depoſitions: after which, it was diſcovered that the title of the cauſe in the commiſſion was miſtaken. Upon an application to ſuppreſs the depoſitions, Lord Chancellor ordered the Six Clerk to amend the commiſſion in reſpect of the title of the cauſe; but the plaintiff to pay the coſts of the motion, and to be at the expence of ſealing a new commiſſion for the examination of the defendant's witneſſes, and the Maſter to ſettle a time, and place for the execution of the commiſſion.

21 April 1713.

Northcote v. *Northcote.*

(Reg. Lib. B. 303.)

LIBERTY given to amend exceptions after arguing them.

Gale

Gale v. *Croft.*

4 Nov. 1713.
2 Eq. Ca. Abr. 415. Pl. 5. S. C.
ibid. 494. Pl. 9. S. C.

Parol evidence refuſed, that it was the teſtator's intention to deviſe his perſonal eſtate exempt from debts.

THE teſtator bequeathed his perſonal eſtate to his executor, and deviſed his real eſtate to be ſold for payment of his debts, the ſurplus of which he gave to his heir at law. The heir at law inſiſted that the perſonal eſtate ought to be firſt applied towards payment of the debts, in eaſe of the real eſtate. The Lord Chancellor would not permit parol evidence to be read of the teſtator's intention, that the deviſe of the perſonal eſtate ſhould be exempt from debts, and decreed the executor to account for the perſonal eſtate.

Ex parte *Aſhton.*

21 Nov. 1713.
28 Nov. 1713.
20 Jan. 1713—14.
Lord Cowper C.

A WOMAN of weak mind, ſuppoſed to be an infant, being ſeduced from her friends in order to marry, a writ *de homine replegiando* was granted on the firſt of the above days. On her being afterwards married, (although no ward) on the ſecond of thoſe days the huſband, and the clergyman were committed to the Fleet. It being afterwards diſcovered ſhe was neither an ideot, nor under age, they, on the laſt of the above days, were diſcharged.

A. D. 1714.
2 Lord Raym.
1327. S. C.

The King v. *Bradford.*

(Reg. Lib. A. fol. 249.)

A bond to the King in his political capacity ſubſiſts to his ſucceſſor.
Bromley v. Jolliffe, 20 June 1774. S. P.

WHEREAS a writ of *ſcire facias* iſſued againſt the defendant, upon his not having performed the condition of a bond entered into by him, and one *Iſaac Pike*, in the penalty of 500 *l.* to her late Majeſty Queen *Ann*, her heirs, executors, and adminiſtrators, to which, upon rules given, the defendant appeared, and put in a demurrer, and his Majeſty's Attorney General having joined in the ſame, and the proceeding having been made a *concilium*, and coming on this day to be argued before the Lord Chancellor in the preſence of Counſel on both ſides, his Lordſhip declared the ſaid bond having been given to her late Majeſty in her political capacity, the ſame ſubſiſted to his preſent Majeſty as her ſucceſſor, and did therefore order that the demurrer be over-ruled.

27 May 1715.
Lord Cowper C.

Pitt v. *Willis.*

THE anſwer of a defendant, not brought to hearing, read as evidence againſt another defendant, at the hearing.

Earl

Earl of *Coventry* v. Counteſs of *Coventry*. 6 July 1715.

THE defendant joined in a commiſſion for the examination of witneſſes, and had commiſſioners preſent at the execution of it, but had not any interrogatories. On application a new commiſſion was granted for the examination of her witneſſes; but the Maſter was to ſettle the interrogatories.

Bertie v. Lord *Falkland*. 10 Nov. 1715. Lord Cowper C.

THE cauſe was heard the 26th of *January* 1677. There was an appeal to the Houſe of Lords on the minutes of the decree. All reſted; and the decree remained undrawn, until the ſuit abated by the death of Lord *Falkland*. The plaintiff applied to have the decree drawn *nunc pro tunc*: it was objected, that the ſuit being abated ought to be revived.

Lord Chancellor.—The drawing up of a decree is as material a thing as can be taken care of, and to paſs and enter a decree *nunc pro tunc*, is to debar the repreſentative of the deceaſed party from taking that courſe he may be adviſed; therefore the ſuit ought to be revived before the decree be paſſed, and entered *nunc pro tunc*; and this Court cannot execute a decree of the Houſe of Lords, but by their order.

Hampden

Lord Cowper C.
1 P. Wms. 733. S. C.
1 Bro. P. C. 250. S. C.

Hampden v. *Hampden.*

A WILL was deſtroyed, and upon ſtrong proof, it was decreed, the will ſhould be taken as ſet out in the bill: a trial denied. On appeal to the Lords the decree was affirmed.

12 Jan. 1716.
Lord Cowper C.

Hales v. *Sutton.*

THE defendants, who were the executors of the teſtator in the cauſe, living abroad, gave a letter of attorney to a perſon to prove the will: ſervice of a ſubpœna to appear, and anſwer, on ſuch attorney or proctor, held to be good ſervice on the defendants.

Lewis Dolman and *Dorothy Dolman* infants, and *Anna Maria Dolman* adminiſtratrix of *Thomas Humphry Dolman*, - - - - } Plaintiffs.

Philip Weſton, *John Smith*, *Henry Dean*, and *Sarah Smith*, - - } Defendants.

25 Feb. 1716.
Lord Cowper C.

(Reg. Lib. A. 238.)

Deviſe of real eſtates charged with debts, &c. and of the perſonal eſtate to the ſame perſon, there being no expreſs words to exempt the perſonal eſtate from the payment of debts, &c. it was held firſt applicable.——2 Vern. 740. S. C. Rep. Eq. 128. S. C. Pice. Ca. 456. S. C. 2 Eq. Abr. 496. S. C. Poply v. Poply, 23 & 24 Car. 2. S. P. Bonham v. Newman, 2 Ch. Ca. 58. 159. S. P. Hall v. Hall. A. D. 1693. Reg. Lib. A. 130.

SIR *Thomas Dolman*, by his will, dated 5th *February* 1710, bequeathed to the defendant *Sarah Smith* all his houſehold goods, and ſundry other particulars,

and

and gave to the plaintiff *Dorothy* 1000 *l.* to be paid at twenty-five; and deviſed his real eſtates in *Shaw* and *Speen*, to the defendants *Philip Weſton*, *John Smith*, and *Henry Dean*, and their heirs, upon the truſts after mentioned, chargeable nevertheleſs with the payment of his debts, annuities, legacies, and funeral expences (his intent being, as the plaintiff *Anna Maria Dolman* alledged, that his real eſtate, and not his perſonal eſtate, ſhould be liable to the payment thereof), and did thereby charge his real eſtate with the payment of the ſame; and directed the ſaid truſtees, and the ſurvivor, &c. to receive the rents and profits of the real eſtates, until his nephew *Thomas Humphry Dolman*, ſince dead, or the perſon who, by virtue of the will, ſhould be entitled to the next immediate reverſion of the premiſes, ſhould attain the age of twenty-five years, and out of the rents to diſpoſe of particular ſums mentioned in the will in the maintenance of the ſaid *Thomas Humphry Dolman* and the preſent plaintiffs, the infants, until they attained the age of twenty-five years; and willed, that the reſidue of ſuch rents (after the payment of his debts, annuities, legacies, and funeral expences), ſhould be paid to the ſaid *Thomas Humphry Dolman*, or ſuch perſon as the next reverſion of the premiſes ſhould belong to, at twenty-five; and after the death of the ſaid *Thomas Humphry Dolman*, and in default of heirs male of his body, to the uſe of the plaintiff *Lewis Dolman*, and the heirs male of his body, with remainders over to the heirs male of other perſons therein named; and thereby alſo gave 500 *l.* to the plaintiff *Lewis Dolman*, payable at twenty-five; and the reſidue of his perſonal eſtate he bequeathed unto the ſaid *Thomas Humphry Dolman*; and appointed

L. Dolman et al. v. *Weſton* et al.

appointed the defendants *Philip Weſton*, *John Smith*, and *Henry Dean*, executors of his ſaid will. The teſtator died the 30th of *April* 1711. *John Smith* and *Henry Dean* proved the will, (*Weſton* declining to prove the ſame), and entered on the real eſtates deviſed, and received the rents and profits thereof, and poſſeſſed the perſonal eſtate, and with the rents paid ſeveral of the debts ſecured by mortgage and bond.

The plaintiff *Lewis Dolman* inſiſted, that the reſidue of the perſonal eſtate, not ſpecifically bequeathed, ought to have been applied to ſuch payment, the ſame being expreſly deviſed to *Thomas Humphry Dolman*, who being dead without iſſue, aged about nineteen years, the plaintiff *Lewis* thereby became entitled to the ſaid real eſtate, and to the 500 *l.* given to him by the will as aforeſaid. And the plaintiff *Anna Maria Dolman* having adminiſtered to the ſaid *Thomas Humphry Dolman* claimed to be entitled to ſuch perſonal eſtate as was deviſed to him, ſubject to be diſtributed according to the ſtatute of diſtributions.

The bill was brought for an account.

The defendants admitted the teſtator was ſeiſed and poſſeſſed of ſuch real and perſonal eſtates, and that he made ſuch will, and died, as before ſtated: That the defendants *Henry Dean* and *John Smith* alone proved the will, and entered on, and received the rents and profits of the real eſtates, and poſſeſſed the perſonal eſtate; and inſiſted that all the perſonal eſtate was liable to the debts, and that they did not know or believe that it was the intention of the teſtator, that his real eſtate only, and not his perſonal eſtate, ſhould be ſubject to the payment of his debts, funeral expences, and legacies; and admitted the death of *Thomas Humphry*

Dolman, an infant and without iſſue, but ſubmitted whether he was entitled to any part of the teſtator's perſonal eſtate. *L. Dolman* et al. v. *Weſton* et al.

Lord Chancellor.—I am of opinion, that although the reſidue of the perſonal eſtate, (above what the teſtator hath by his will before bequeathed,) is deviſed, yet it is deviſed to the ſame perſon whom he makes deviſee of his real eſtate, which real eſtate, and the ſurplus profits thereof, the teſtator deſigned ſhould be received by his truſtees, till the deviſee, who ſhould firſt take, ſhould attain the age of twenty-five years; ſo that his intent was to increaſe, and enlarge the eſtate of the deviſee of his real eſtate as much as poſſible; and here not being expreſs words in the will to exonerate the perſonal eſtate from the payment of debts, to which by law it is liable in the firſt place; to conſtrue it to be exempt from the payment of debts and legacies, in order to put the larger perſonal eſtate into the hands of the firſt taker of the real eſtate before the age of twenty-five, when it might fall, (which hath in fact happened,) to an adminiſtrator, would not be according to the will, but contrary to the intent of it, which principally favours the taker of the real eſtate: And therefore let an account be taken of the teſtator's perſonal eſtate, not ſpecifically bequeathed, and of his debts, legacies, and funeral expences, and let the perſonal eſtate be applied in payment of them; and declare the clear ſurplus of the ſaid perſonal eſtate, after payment of the teſtator's debts, &c. belonged to *Thomas Henry Dolman*, and now to the plaintiff *Anna Maria Dolman*, the adminiſtratrix of the ſaid *Thomas Henry Dolman*, ſubject to the law concerning inteſtate's eſtates, and let the ſame be paid to her.

Harvey

11 July 1716. Lord Cowper C.

Harvey v. *Matthew.*

A DEMURRER, after the defendant had ſtood out all proceſs of contempt to a ſequeſtration, allowed to ſtand.

Lord Cowper C. 1 Auguſt 1716.

Moore v. *Meynell.*

A writ of *ne exeat regno* againſt a feme covert, the adminiſtratrix of her late huſband, who had come to England to get in his property.

(a) The order is not entered. J. D.

BY an order (*a*) dated the 11th of *April* 1719, on an application for the wife to go to her huſband, who was at *Antigua*, it appeared that the plaintiff had had dealings with the late huſband of the defendant *Ann Meynell*, who was his adminiſtratrix, and had poſſeſſed what effects ſhe could; that ſhe had intermarried with the defendant *John Meynell*; that ſhe had come to *England* upon buſineſs, and meant to return; that a writ of *ne exeat regno* had iſſued againſt her until anſwer, and further order; that having given bail, and put in her anſwer, ſhe had applied to have the writ diſcharged, which the Court had ordered, upon her giving ſecurity to abide the event of the ſuit; and that ſhe had given ſecurity accordingly.

N. B. The Court upon this application put terms upon the plaintiff to ſpeed the cauſe.

Lord

Lord *Howard* v. Lord *Abergavenny*.

6 Auguſt 1717. Shepherd v. Shepherd, 25 May 1732. Tribe v. Teal, 27 May 1745. Billers v. Billers, 1 Auguſt 1751. S. P.

A TESTAMENTARY guardian aſſigned guardian for an infant, who is abroad, to anſwer and defend the ſuit.

Deardan v. *Halſey*.

28 Jan. 1718.

THE defendant ordered to be committed for a contempt; but not being to be found, a ſequeſtration iſſued; the ſequeſtrators having returned *nulla bona*, liberty was given to execute the warrant of commitment.

Periſhal v. *Squire*.

Hil. 1718. Lord Macclesfield C. Vid. Dickenſon v. Marie inf.

THE plaintiff, a pauper, claimed as heir at law; the defendant claimed under a will not proved, and a deed diſputed: the bill was retained, with liberty to bring an action. The tenants ordered to pay the plaintiff 150 *l.* to enable him to go to trial.

Davis

3 May 1718.
2 Eq. Abr. 554.
S. C.

Davis v. Davis.
(Reg. Lib. A. fol. 619.)

AN executor having voluntarily paid legacies, and the aſſets afterwards proving deficient, the legatee was decreed to refund. The like determination in (a) *Roberts* againſt *Roberts*, by Lord *Thurlow* C., and the like in *Deſchamps v. Tomkins*, at the ſittings after Trinity Term 1789. Vid. alſo *Dagly* v. *Crump.* inf.

(a) Bro. C. C. 487.

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25 Oct. 1718.

Creſwell v. *Radcliffe.*
(Reg. Lib. A. 557.)

THE bill was brought without the conſent of one of the plaintiffs: upon application to diſmiſs the bill, it was ordered that his name ſhould be ſtruck out as one of the plaintiffs.

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24 Feb. 1719.

Woodroffe v. *Wood.*

HEIR at law deſtroys the will, whereby the eſtate was, as it was alledged, deviſed to the plaintiff. The heir at law was decreed to convey the eſtate to the plaintiff, and his heirs. A trial was denied whether there was ſuch a will as ſet out in the bill.

Alpha

Alpha v. *Payman.*

East. 1719.

Liberty given to take an anſwer off the file, and to put in a new anſwer, upon a diſcovery that defendant at the time was ignorant of his intereſt.

THE plaintiff drew the defendant into an agreement, whereby, in conſideration of 300 *l.* he was to relinquiſh to the plaintiff all his right to the real, and perſonal eſtate left to him by *J. S.* The bill was, to have the agreement performed: the defendant put in his anſwer, in which he confeſſed the agreement, and ſubmitted to have it performed; but afterwards diſcovering that the eſtates ſo left to him were of ſeveral thouſand pounds value, he, therefore, this day applied for liberty to take his anſwer off the file, and to put in another anſwer, which was granted.

Woodward v. *Woodward.*

11 May 1719.

THE defendant appealed from a decree pronounced by the Maſter of the Rolls in the original cauſe. Before it was brought on, the plaintiff filed a ſupplemental bill to carry the decree into execution, apprehending he had not proper parties to the decree when pronounced: the defendant demurred (*inter alia*), for that the appeal was not determined: the demurrer was over-ruled.

Clifford v. *Beeſton.*

Trin. 1719.

The courſe purſued when a *certiorari* cauſe is brought to hearing.

A CERTIORARI bill, to remove a cauſe out of the Mayor's Court. Upon the cauſe coming on to be heard, a queſtion aroſe, whether the bill in this

Clifford v *Beeſton.* Court ſhould be firſt opened. After debate, the bill in the Mayor's Court was firſt opened, then the anſwer to that bill, and the counſel for the bill in the Mayor's Court ſtated the caſe and proofs, and then the plaintiffs in this Court made their defence.

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23 July 1719.

Diddleford v. *Tichner*, an infant.

(Reg. Lib. A. fol. 493.)

Plea to a ſubpœna *ſcire facias*, to revive a decree, allowed.

THE original bill was brought to have a ſettlement made by the late defendant *John Tichner*, the father of the preſent defendant, of certain lands, &c. to the uſe of himſelf for life, and after his death, to the late plaintiff *Elizabeth* and her heirs for ever, in lieu of a former ſettlement, which he had deſtroyed. And upon hearing the ſaid cauſe, the ſaid late defendant was decreed to execute a good conveyance to the plaintiff *Elizabeth* and her heirs, to commence from the death of the then defendant *John Tichner*. *John Tichner* died, and a ſubpœna *ſcire facias* having been iſſued againſt the defendant *John Tichner*, his infant ſon, he put in a plea ſtating that the lands that came to him on the death of his father, and no other, he claimed as heir in tail male of his father, under the will of *John Tichner* his grand-father, his father having done no act by fine, or otherwiſe, to bar the entail: the plea was allowed.

Dagly

Dagly v. *Crump*.

18 July 1719. Lord Macclesfield C.

Liberty given to amend an anſwer ſo as to explain an admiſſion therein of aſſets. Vid ſup. Davis v. Davis.

JOHN *Egleſham* in 1692 procured of Sir *Richard Crump* to admit him a partner in buying particular parcels of tallow, by means of which, and otherwiſe, being indebted to Sir *Richard Crump*, *Crump* arreſted him, and he confeſſed judgment for one thouſand pounds.

Matters were referred to arbitrators, and they found *Egleſham* indebted to Sir *Richard Crump* in two hundred and ſixty-eight pounds.

Before payment Sir *Richard* died, and Dame *Margaret* his widow, the executrix, proved his will.

In 1699 *Egleſham* filed a bill againſt her for an account of dealings and tranſactions between him and her ſaid late huſband: ſhe anſwered, and ſubmitted to account: and in 1704 the cauſe was heard at the inſtance of the defendant, and an account was directed.

The Maſter, on the 16th *June* 1712, reported, that there was due from *Egleſham* to the eſtate of Sir *Richard* 67 *l.* Both ſides took exceptions; and on the 14th *January* 1714, it was referred to the Maſter to review his report. Before it was reviewed, Dame *Margaret Crump* died, having made her will, and appointed the defendant ſole executrix, who proved it.

Egleſham filed a bill of revivor and ſupplement, to revive, and have the benefit of the decree in the original cauſe.

The preſent defendant anſwered, and from an idea that upon taking the account *Egleſham* would be found

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indebted to the eſtate of Sir *Richard Crump*, admitted aſſets to ſatisfy the plaintiff's demand.

The Maſter proceeded to review his report, but the defendant, and her teſtatrix Dame *Margaret Crump*, having unfortunately employed a clerk in Court who neglected their affairs, and did not attend the Maſter therein; on the 26th of *October* 1717 he made his report, and thereby found Sir *Richard Crump* was indebted to *Egleſham* to a large amount.

The defendant took exceptions to the report, which came on to be argued on the 1ſt and 3d days of *May* 1717, which, for want of full evidence, through the neglect of her ſolicitor, were overruled.

The balance found due being twice as much as the defendant was worth, ſhe, as executrix of the ſaid Dame *Margaret*, having never poſſeſſed, nor been able to poſſeſs, more of the eſtate of the ſaid Dame *Maagaret*, or of the eſtate of the ſaid Sir *Richard Crump*, after payment of his debts and funeral expences, than 400 *l.*, except 100 *l.* a year in freehold lands, which came to her partly by deſcent, and partly by purchaſe, which could not have been liable to the plaintiff's demands had ſhe not inadvertently admitted aſſets; ſhe on the 19th of *June* preferred a petition ſtating to the above effect, that as the caſe ſtood ſhe was not only in danger of loſing the whole of her eſtate, but her liberty: that ſhe had obtained an order to re-argue the exceptions, but before the ſame were re-argued, the ſaid late plaintiff *John Egleſham* died, and the plaintiffs were his repreſentatives; and by her petition ſhe prayed, that ſhe might be diſcharged from the admiſſion in her anſwer.

Upon

Upon hearing the petition this day, after reading an affidavit of *John Rowe* the counſel, and *Richard Haſſel* the ſolicitor, who drew and adviſed her anſwer, and thereby admitted aſſets, upon an idea, and that only, that inſtead of Sir *Richard Crump*'s being indebted to *Egleſham*, he was indebted to Sir *Richard*: and upon reading an affidavit of the defendant to the like effect, his Lordſhip, after hearing counſel on all ſides, declared he was of opinion, conſidering the circumſtances of the preſent caſe, that the defendant ought to be at liberty to alter and amend her anſwer, ſo far as to explain the admiſſion of aſſets therein in ſuch manner as to admit aſſets to anſwer the plaintiff's demand, if ſuch demand do not amount to above 400 *l.* and gave her leave to amend the ſame accordingly, ſhe reſwearing the anſwer ſo amended: but the plaintiff was to be at liberty to examine the defendant as to further aſſets.

Dagly v. *Crump.*

19 July 1719.

Pitt v. *Brewſter.*

3 Feb. 1721.

BILL for an account of the teſtator's eſtate. It was objected, that one of the executors was not a party: he was ordered to be introduced into the decree (*a*) then made, as a party, and ordered to account before the Maſter, without putting off the cauſe to add parties.

(*a*) The decree is not entered. J. D.

2 Nov. 1721. 1 P. Wms. 734. S. C. 2 Eq. Ca. Abr. 516. S. C.

Richmond v. *Taylour.*

A DECREE by conſent, to the prejudice of an infant, and no day given for him to ſhew cauſe when of age: having attained twenty-one, he filed a bill to be relieved againſt the decree, and to ſet the ſame aſide.

Where there is any fraud in carrying on, or defending the cauſe of an infant, he may ſeek his ſatisfaction againſt his guardian, or bring his bill to be relieved againſt the fraud.

Lord Chancellor.—Where there is any fraud in carrying on, or defending the cauſe of an infant, he may ſeek his ſatisfaction from his guardian, or he may bring his bill to be relieved on the head of fraud; but no fraud appearing in obtaining the decree, the plaintiff is barred thereby, and therefore let the bill ſtand diſmiſſed.

18 Dec. 1721. 1 P. Wms. 753. S. C.

Hamphreys v. *Incledon.*

DEMURRER to a bill of revivor, for that the plaintiff doth not charge ſhe hath proved her huſband's will, allowed.

14 May 1722. Vid. Bagſhaw v. Earl of Thanet, 12 Nov. 1743. Earl Gower v. Ducheſs of ——, May 1764. & —— & Chriſt. Coll. 14 Dec. 1787.

Bowhee v. *Grills.*

THE defendant, without being ſerved with a ſubpœna to appear, put in a plea and anſwer: the plea was allowed: a queſtion was made, whether the defendant was entitled to coſts, having appeared voluntarily. Lord Chancellor held that by the practice the defendant did not loſe his coſts.

Carter

Carter v. *De Brune.*

22 July 1722.

APPLICATION that ſervice of a ſubpœna to appear on a perſon, who tranſacted matters under a letter of attorney from the defendant, might be deemed good ſervice on the defendant. This, although oppoſed, was granted.

It ſhould ſeem the cauſe, upon this order's being granted, was compromiſed, there being no further traces of it. J. D.

Sir *Cæſar Child* Baronet, Plaintiff.

Henry Godolphin, and *Frances Comber* and others, - } Defendants.

11 March 1723.

(Reg. Lib. A. fol. 135.)

THE matter of the plea put in by the defendant *Comber* coming on the 5th inſtant to be argued in the preſence of Counſel learned on both ſides; the ſaid plea, as to ſuch part of the bill as ſeeks to compel her to execute an aſſignment of her term in the leaſe from the Dean and Chapter of Saint *Paul*'s in the bill mentioned, and of all her right and benefit of and in renewing the ſame, and of her right and title from the crown for holding *Shadwell* Market, and which ſeeks to compel her to perform the pretended agreement for the ſaid defendant's intereſt in the ſaid leaſe, and purchaſe of the grant in the bill alſo particularly mentioned, being, that by an act of parliament made in the 30th year of King *Charles* II. entitled, an act for the prevention of frauds and perjuries, it is amongſt other things enacted, that from and after the 24th *June* 1677, no action ſhould be brought whereby to charge any perſon on any

If a defendant pleads the Statute of Frauds to a bill for a ſpecifick performance, he muſt by anſwer deny the agreement; for if he admits it, he takes it out of the ſtatute.

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agreement or contract for ſale of lands, tenements, and hereditaments, or any intereſt in or concerning them, unleſs the agreement on which ſuch actions ſhould be brought, or ſome memorandum or note thereof, ſhould be in writing, and ſigned by the parties to be charged therewith, or ſome other perſon by him lawfully authorized. And the ſaid defendant inſiſted, that ſhe, or any other perſon by her lawfully authorized, did never ſign any agreement or any memorandum or note, whereby ſhe agreed to ſell or aſſign the ſaid premiſes, or any part thereof, for the ſum of 750 *l.*, or any other ſum; nor did ſhe remember that ſhe, or any other perſon by her authorized, did ever ſign any memorandum, writing, or note, any ways relating to any agreement for the ſale of the ſaid premiſes, or any part thereof, to the plaintiff, ſaving the letter in the bill mentioned to be dated the 22d of *April* laſt, which was brought to her by the plaintiff, ready written and prepared by the plaintiff, as ſhe believes, and to which the plaintiff earneſtly deſired her to ſubſcribe her name, alledging the ſame to be only a letter of recommendation; and as the ſame was directed to the ſaid Dean, ſhe apprehended it was to have been carried to and left with the ſaid Dean; and in confidence thereof, ſhe was induced to ſubſcribe the ſaid letter; and is adviſed and inſiſts the ſaid letter is not ſuch a writing, note, or memorandum as is meant by the ſaid act to make good an agreement relating to land, in regard the terms of the ſaid pretended purchaſe, or the ſum or price which the plaintiff was to pay for the ſame, is not expreſſed therein, and the omiſſion thereof leaves the caſe liable to all the miſchiefs and inconveniencies which

which by the ſaid act are intended to be prevented; and after ſhe had ſubſcribed the ſaid letter, the plaintiff was ſo far from thinking the ſame was binding to the defendant, that he offered to give her 1000 *l.* for part of the ſaid premiſes, and proceeded ſo far as to procure a writing to be drawn touching the ſaid ſubſequent propoſed agreement.

Upon hearing the ſaid plea, and debate of the matter, and hearing of what was alledged on both ſides, it was ordered that the ſaid plea ſhould ſtand for an anſwer, with liberty for the plaintiff to except thereto, and that the benefit thereof ſhould be ſaved to the defendant until the hearing of the cauſe; with which order the defendant *Comber* conceiving herſelf aggrieved, for that the plaintiff may except to the ſaid plea touching the matters relating to the ſaid pretended agreement which ſhe is adviſed ſhe ought not to anſwer unto, and after a replication filed, may ſerve her with a ſubpœna to rejoin and examine witneſſes to eſtabliſh his pretended parol agreement, by means whereof the defendant may be deprived of the benefit of the ſaid ſtatute, or at leaſt be put to great and unneceſſary expence; therefore appealed therefrom, and petitioned the Right Honourable the Lord Chancellor of *Great Britain* to have the ſaid plea re-argued, which being granted, and depoſiting five pounds with the Regiſter, and the matter of the ſaid plea coming this preſent day to be re-argued before his Lordſhip.

Upon hearing the ſaid plea and the plaintiff's bill read, and of what was alledged on both ſides, his Lordſhip ſaw no cauſe to vary the ſaid order, and doth

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doth order that the ſame be confirmed, and that the depoſit be paid to the plaintiff.

His Lordſhip ſaid, the plea inſiſting on the ſtatute was proper, but then the defendant ought by anſwer to deny the agreement; for if ſhe confeſſed the agreement, the Court would decree a performance notwithſtanding the ſtatute, for that ſuch confeſſion would not be looked upon as perjury, or intended to be prevented by the ſtatute.

11 March 1723.

Davis v. *Larner.*

Demurrer to an original bill to vary a decree, allowed.

(*a*) It will for fraud.

J. D.

ON a demurrer, for that the plaintiff ſeeks to vary a decree againſt him, which by the rules of the Court cannot be done by original bill; (*a*) it was urged that the decree not being ſigned and enrolled, a bill of review doth not lie: but the Court held it did, and allowed the demurrer.

23 May 1723.

Sayer v. *Sayer.*

(Reg. Lib. B. fol. 386.)

Suit revived by *ſcire facias*, and coſts of a plaintiff, who had married ſince the decree ordered to be taxed.

THE decree gave the plaintiff *Mary Sayer* her coſts: the decree was ſigned and enrolled, and the accounts were taken; but before the coſts of the ſaid *Mary Sayer* were taxed, ſhe intermarried with *Edmund Littlehales*. Application was this day made for a ſubpœna *ſcire facias* againſt the defendants in the original cauſe, to ſhew cauſe why the decree and proceeding

ceeding ſhould not ſtand revived, and why the ſame ſhould not be performed to the ſaid *Littlehales* and his wife, as the ſame would have been, had they not intermarried. The defendants ſhewed cauſe, which was diſallowed, and the order made abſolute, and the decree and proceeding were ordered to ſtand revived. *Sayer* v. *Sayer.*

Hayward v. *Colley.* 3 July 1724.

(Reg. Lib. A. fol. 370.)

A JOINT commiſſion executed. The plaintiff examined ſeveral witneſſes: afterwards the defendant added interrogatories in the examiner's office, and examined ſeveral witneſſes. The regularity being queſtioned, it was referred to the Maſter, and upon exceptions to his report, the Court, as publication had not paſſed, held it to be regular.

Heath v. *Lake.* 23 July 1724.

IT was ſaid, that the anſwer cannot be read to ſupport a demurrer: but it appears by the order that the anſwer was read.

Raſtel

10 Feb. 1726.

Raſtel v. *Hutchinſon.*

Plea of the Srat. of Frauds to have the benefit of a purchaſe made by the defendant, who was employed for the purpoſe, but who took the conveyance to himſelf.

PLEA of the Statute of Frauds: the bill charged, that the plaintiff had employed the defendant *Hutchinſon* to purchaſe a houſe for him of Sir *Matthew Jenniſon*; that he accordingly made ſuch purchaſe, and took a conveyance to himſelf, and refuſed to make a conveyance to the plaintiff, and that in order to prevent the plaintiff from enjoying the premiſes, he reconveyed the ſame to the ſaid Sir *Matthew Jenniſon*; the bill was, therefore, againſt both, and by it the plaintiff prayed to have a performance of the purchaſe.

Upon the plea's being argued, it was ordered to ſtand for an anſwer, with liberty for the plaintiff to except, and the benefit ſaved to the hearing.

20 April 1726.

Gambier v. *Lebeup.*

THE defendant put in his anſwer: the plaintiff afterwards amended his bill; the defendant then put in a plea to the whole bill. On the above day, the plaintiff moved to diſcharge the plea, becauſe it was to the whole bill: but the Court denied the motion.

Gibſon

Gibſon v. *Scudamore.*

(Reg. Lib. A. fol. 181.)

7 Nov. 1726. Lord King C. Select. Ca. in Ch. 63. S. C. 2 Eq. Abr. 773. S. C. Moſel. 6. S. C.

ON a bill brought on behalf of an infant againſt his truſtee, under his father's will, the ſum of 8000 *l.* and upwards was found to be in the hands of Mr. *Price* the truſtee. The ſaid truſtee afterwards purchaſed an eſtate contiguous to the infant's, and by will deviſed that eſtate to the infant in fee ſimple, and died. The infant afterwards died inteſtate. Upon the infant's death, a queſtion aroſe between the heir at law, and the next of kin of the infant, whether the eſtate ſo deviſed was to be conſidered as real, or perſonal eſtate; and this ſuit was inſtituted to determine it.

Lands purchaſed by the guardian of an infant with his perſonal eſtate, will, in caſe of his death during his minority, be conſidered ſtill as perſonalty.

The Lord Chancellor was of opinion, that the deviſe of the eſtate was a ſatisfaction *pro tanto* of what was due from the deviſor, and that 3,330 *l.*, the purchaſe money, was to be deducted out of it, with intereſt, and that ſuch 3,330 *l.* and the intereſt, were to be conſidered as part of the perſonal eſtate of the ſaid infant.

Holles v. *London* Aſſurance Company.

15 Jan. 1728.

BILL to be relieved as to a policy of inſurance, upon pretence, that the truſtee would not conſent to have his name uſed. The defendant demurred; and the demurrer was allowed.

Lethieullier

27 Oct. 1726.
Lord King C.
2 Eq. Abr.
161. S. C.
Sel. Ca. in Ch.
60. S. C.

Lethieullier v. Lord *Caſtlemain.*

(Reg. Lib. B. fol. 196.)

Iſſue to try and ſettle boundaries of two manors by a ſpecial jury, and to have a view.

THE bill was, that the defendant might admit the boundaries between the manors of the plaintiff and defendant, or that a commiſſion might iſſue to ſet out the ſame, and to examine witneſſes to perpetuate their teſtimony, and to be quieted in the poſſeſſion of the pond in queſtion, and for an injunction.

The bill ſtated, that the plaintiff had for many years been ſeiſed in fee ſimple of the manor of *Aldeſbrook* in *Eſſex*, and of the capital houſe called *Aldeſbrook Houſe*, and of a pond containing eight acres, and of three hundred acres of heath, furze, and moor, being the waſte grounds, and part of the demeſne of the ſaid manor: that the right to the ſaid manor was derived under letters patent, dated the 26th of *April*, 26th of *Henry* VIII.: that the ſaid manor and waſte ground had been, time out of mind, diſtinguiſhed from other manors in the neighbourhood by marks, and bounds, and in particular from the manor of *Wanſted* belonging to the defendant: that ſundry acts were done by the former proprietors of the ſaid manor of *Aldeſbrook*, ſuch as cutting turf, and by bringing actions againſt the owners of the ſaid manor of *Wanſted*, for treſpaſſes by them committed on the ſaid manor of *Aldeſbrook*, in which verdicts had been obtained.

The bill then ſtates, that the defendant had, in order to enlarge his park, cut the head of the ſaid pond, and had taken part of the waſte of the ſaid manor of

Aldeſbrook into his park, claiming right thereto as part of the ſaid manor of *Wanſted.*

The defendant by his anſwer admitted the plaintiff's right to the manor of *Aldeſbrook*, and that he the defendant had enlarged his park, and had incloſed in it part of the waſte, but denied the ſame to be part of the plaintiff's manor; and admitted he claimed all the waſte ground, and the pond, which the plaintiff by his bill ſtated to be within the manor of *Aldeſbrook.*

Mr. Attorney General and Mr. *Smart* were Counſel for the plaintiff.

Mr. Solicitor General, Mr. *Lutwych*, and Mr. *Mead*, were Counſel for the defendant, who argued, that the matter was entirely legal; that the plaintiff might try his right at law, and that there was nothing to prevent the plaintiff's bringing an action at law.

Lord Chancellor.—Let the plaintiff proceed to a trial at bar in the Court of King's Bench, to try whether the pond in the bill called *Aldeſbrook Pond*, be the plaintiff's or the defendant's; and alſo to try what are the boundaries between the plaintiff's and the defendant's manors, lands, and ſoil; the plaintiff offering, if he ſhall be entitled to coſts, to accept *niſi prius* coſts; and if the defendant ſhall be entitled to coſts he will pay coſts on a trial at bar, and the iſſues to be tried by a ſpecial jury of the county of *Eſſex*, and the jury to be returned not to be freeholders of the foreſt of *Waltham*, but freeholders in other parts of the county: and each party is to deliver to the other a note in writing, containing a particular of the boundary inſiſted on by them; and each boundary is to be tried, and if the jury ſhall find any other particular boundary, they are to mark the ſame on the back of the

Lethieullier v. Lord *Caſtlemain.*

the *habeas corpora* or *diſtringas*; and the jury are to have a view of the places in queſtion before the trial, to be ſhewn to them by two perſons, one of whom is to be named by the plaintiff, and the other by the defendant; and reſerve coſts and further directions.

19 Oct. 1726. 2 Eq. Abr. 579. S. C. Sel. Ca. in Ch. 57. S. C. 2 P. Wms. 373. S. C. 3 Bro. P. C. 305. S. C.

Blakeway v. Earl of *Strafford.*

BILL to be paid a debt of twenty years ſtanding, due from Sir *Thomas Johnſon*: by his will he directed his perſonal eſtate to be applied in payment of his debts; and if the perſonal eſtate ſhould not be ſufficient, then his real eſtate to be ſubject to his debts. The defendant pleaded the Statute of Limitations: the plea, on argument, was over-ruled; the will directing his debts to be paid taking the caſe out of the ſtatute.

22 Nov. 1726. Sel. Ca. in Ch. 69. S. C. 2 Stra. 733. S. C. 2 Eq. Abr. 524. S. C. Moſel. 1. S. C.

Burrows v. *Jamereau.*

THE bill was, to be relieved againſt two actions brought upon two bills of exchange, the drawer having failed before the bills were accepted; and by the cuſtom of *Leghorn*, the acceptance is void, if it be after the drawer becomes a bankrupt; and ſo it was determined in the preſent caſe in the proper Court of *Leghorn*, in which a decree had been made for ſetting aſide the acceptance.

Decree at Leghorn allowed to be read as evidence; and this Court would not over-rule what was determined there.

Upon hearing this cauſe, the Court allowed the ſaid decree to be read, and ſaid, This matter hath been

been judicially determined at *Leghorn*, and this Court will not over-rule what was determined in a proper Court, where the action was brought: therefore let the injunction granted in this cauſe be perpetual, and let the defendant, at the plaintiff's expence, acknowledge ſatisfaction on the record of the judgment. *Burrows* v. *Jamineau.*

Strickland v. *Mackenzie.* 11 Jan. 1727.

PLEA, and anſwer: plea, on arguing, ordered to ſtand for an anſwer, without liberty to except. The plaintiff took exceptions, and at the ſame time ſerved the defendant with a ſubpœna to make a better anſwer: the Court held he could not do both.

Gage v. *Hunter.* 1 Feb. 1727.

LIBERTY given to examine a witneſs *viva voce* after publication, as to a particular fact, and the defendant to croſs-examine him.

Box v. *Allen.* 26 April 1727.

BILL to be relieved againſt an order of the Commiſſioners of Sewers. Demurrer to ſo much of the bill as ſought to alter any of the orders of the commiſſioners, or to return any money by them receive for that the remedy was at law, and no equity to relieved in this Court. The demurrer was over-ru

28 April 1727.

Hamond v. ———.

A WITNESS examined two days after publication paſſed; the time having been previouſly appointed without thought of the day.

Publication would paſs; and the defendant having croſs-examined the witneſs, the Court would not ſuppreſs the depoſition.

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11 April 1728.
2 Eq. Abr. 332. 368. S. C. Ca. Temp. Talb. 251. S. C.

Thomas v. *Hole.*

A bequeſt to relations means ſuch perſons as would be entitled under the Statute of Diſtributions.

JOHN *Harrold*, by will, directed his executors to pay 500 *l.* to all the relations of *Edith Hole*, to be equally divided between them. The queſtion was, what perſons ſhould be deemed relations to take under the deviſe.

The Court was of opinion, that by the relations of *Edith Hole* it was to be underſtood, ſuch relations as would be entitled to a ſhare of *Edith Hole*'s eſtate according to the Statute of Diſtribution of inteſtate's eſtates; and that ſuch perſons were entitled to the 500 *l.* equally between them, and decreed payment accordingly.

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19 July 1728.

Mackworth v. *Penroſe.*

APPLICATION to uſe depoſitions taken in a former cauſe between other parties at the hearing of this cauſe, as to the credit of one *Spoller*, a witneſs, denied.

Counteſs

Counteſs of *Warwick* v. *Edwards*.

6 Nov. 1728.
1 Eq. Abr. 140. S. C. 2 Bro. P. C. 494. S. C. Vid. 2 P. Wms. 171.

Reverſion in fee after an eſtate tail ſpent, held to be aſſets to pay debts.

BY indentures of leaſe and releaſe, dated 5th and 6th of *January* 1696, previous to the marriage of *Edward* Earl of *Warwick*, deceaſed, with the plaintiff the Counteſs, the ſaid Earl conveyed the manors of *Abbots Kenſington* and *Earl's Court Kenſington*, and other eſtates therein mentioned, to truſtees, to the uſe of himſelf and his heirs, until the marriage; and then as to the premiſes (except *Abbots Kenſington* and *Earl's Court*), to truſtees for 90 years, without impeachment of waſte, if the ſaid Earl and his intended wife ſhould ſo long live, in truſt to pay her 400 *l.* a year for her ſeparate uſe as pin-money, if ſhe ſhould ſo long live, and the remainder of the rents to the Earl *Edward*: and as to all the premiſes (ſubject to the ſaid term), to the uſe of the ſaid Earl *Edward* for 99 years, if he ſhould ſo long live, without impeachment of waſte, remainder to truſtees to preſerve contingent remainders; then as to all the eſtates (except *Kenſington Abbots* and *Earl's Court*), to the uſe of the Counteſs for life, for her jointure; with remainder for a term of 500 years, for raiſing portions for younger children of the marriage; with remainder, as to all the eſtates, to the firſt and other ſons in tail male. And a term of 500 years was created for raiſing portions, and for maintenance of the daughters in caſe of failure of iſſue male; with remainder to the uſe of the ſaid Earl *Edward* and his own right heirs.

And reciting that 10,000 *l.*, part of the Counteſs's fortune, was placed out on ſecurity, it was covenanted that the ſame, when paid in, ſhould be laid out in the

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purchaſe of lands, and thoſe lands to be ſettled to the ſame uſes as the real eſtates were thereby limited.

The marriage was had. *Edward Henry*, afterwards Earl of *Warwick*, was the only iſſue of it.

Earl *Edward* made his will, dated 4th *July* 1702, and thereby directed his debts to be paid, and charged and ſubjected, as far as he was able, his real eſtate with the payment.

On the 13th of the ſame *July* he died, leaving the Counteſs of *Warwick*, the plaintiff in this cauſe, his widow, and the ſaid *Edward Henry*, his only child, his heir at law.

There being no other iſſue, the two terms of 500 years ceaſed.

Earl *Edward Henry* entered, and became ſeiſed of the manors of *Abbots Kenſington* and *Earl's Court* as tenant in tail, with remainder to himſelf in fee, and levied a fine of the eſtates, and declared the uſes to himſelf in fee.

The 10,000 *l.*, part of the Counteſs's fortune, had not been laid out in the life-time of Earl *Edward*.

On the 18th of *Auguſt* 1720 Earl *Edward Henry* died inteſtate, and without iſſue, having never been married, and the eſtates deſcended in fee to the Lady *Elizabeth Edwards*, his aunt and heir at law, who was alſo heir at law of the ſaid Earl *Edward*.

The 10,000 *l.* not having been laid out in lands, *John Edwards*, and the ſaid Lady *Elizabeth* his wife, filed their bill to have the ſaid 10,000 *l.* laid out in lands, and ſettled ſo as to give Lady *Elizabeth* an eſtate in fee ſimple.

On the 16th *June* 1723 the cauſe was heard, and the 10,000 *l.* was decreed to be laid out in the pur-

chaſe of lands, and ſettled to the uſe of the right heirs of Earl *Edward Henry*.

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The defendant the Counteſs, the mother of the ſaid Earl, and plaintiff in this cauſe, appealed to the Houſe of Lords, for that, as ſhe was adviſed, by the fine levied by the ſaid Earl *Edward Henry* as aforeſaid, the eſtate tail in the manors, &c. ſettled as aforeſaid, was barred, and he ought in equity to be conſidered as poſſeſſed of the ſaid 10,000 *l.*

On hearing the appeal, the decree was affirmed.

In 1726, the Counteſs of *Warwick*, on behalf of herſelf and others, creditors of Earl *Edward* her late huſband, filed a bill ſtating the above recited facts; and that the ſaid Lady *Elizabeth Edwards* was dead, leaving the defendant *Edward Edwards*, her eldeſt ſon and heir at law, an infant, whereby the truſt of the ſaid 10,000 *l.* deſcended to the ſaid defendant *Edward Edwards*, as heir at law as well of his mother as of the ſaid Earl *Edward*, and Earl *Edward Henry*, and inſiſting that the ſame, and alſo the eſtates and the premiſes ſettled as aforeſaid, in regard the eſtate tail therein was ſpent, and the remainder in fee had taken place therein in poſſeſſion, were and ought to be conſidered as part of the aſſets, and real eſtate of the ſaid Earl *Edward* deceaſed, deſcended from him to the ſaid defendant *Edwards*, as heir at law of the ſaid Earl *Edward*, Earl *Edward Henry*, and Lady *Elizabeth Edwards* his mother, and that the ſame ought to be ſubject to the payment of the ſeveral debts due from the ſaid Earl *Edward* to the plaintiffs, and his other creditors: and the plaintiff, the Counteſs of *Warwick*, by her bill prayed ſatisfaction out of the perſonal eſtate of the ſaid

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Earl *Edward*, or out of the real estate, and the said 10,000 *l.*

Part of the debt claimed by the plaintiff the Countess, was for the arrears of the 400 *l.* a year under her marriage settlement, for pin-money.

It was insisted on the part of the defendants, that the claim of pin-money was very stale, no demand having been made for twenty-five years; that the other demands of the plaintiff were within the Statute of Limitations, no action having been brought against the administrator, with the will annexed of the said Earl *Edward:* that although Earl *Edward* did make such will as stated in the bill, and did charge his reversion in the estate with payment of his debts, yet Earl *Edward Henry* having, in Trinity 1719, levied a fine, and there being no demand from that time till 1726, when the bill was brought, it ought to be presumed, from the length of time, that the plaintiff's demand had been satisfied.

To which it was answered, that the length of time between the arrears of pin-money accrued, and the demand, was owing to the said Earl *Edward*'s not having left personal assets, and that till his reversion in fee fell in, which was not till *August* 1720, there was nothing to pay the demands; and in 1726 the plaintiffs filed their bill: that the said Earl *Edward* had, by his will, charged and subjected his real estate with the payment of his debts, and that reversion in fee of the estates was the only estate he had to charge in aid of his personal estate, and therefore the only question was, whether the reversion in fee after an estate tail spent, were assets in the hands of the heir at law

law to whom the reverſion deſcended. *Traver* v. *Black*, *July* 1708, was cited, where aſſets deſcended were decreed to be ſold to pay debts. Countess of *Warwick* v. *Edwards*.

The Lord Chancellor was of opinion, that the reverſion in fee of the eſtates deſcended to the heir at law, was aſſets liable to the debts of the ſaid Earl *Edward*, and directed the neceſſary accounts, and payment, and ſale of the real eſtates for the purpoſe.

Done v. *Allen*.

13 Nov. 1728. Lord King C.

DEMURRER, and anſwer to a bill for a diſcovery. The defendant finding he had made the diſcovery by his anſwer, did not ſet down the demurrer to be argued, and the plaintiff not proceeding, the bill was diſmiſſed for want of proſecution. This, upon reference, found to be irregular, as the demurrer ſhould have been diſpoſed of. The order for diſmiſſing the bill was diſcharged.

Cox v. *Colley*.

4 March 1729. Lord King C.

THE bill was to examine witneſſes *in perpetuam rei memoriam*. The defendant demurred, for that the plaintiff had not eſtabliſhed his right at law, which he ought to do before he was permitted to examine his witneſſes.

Demurrer to a bill to examine witneſſes to perpetuate their teſtimony, for that the plaintiff had not eſtabliſhed his right at law, over-ruled.

The Solicitor General for the plaintiff. There is a plain impediment laid in our bill, whereby we are prevented from trial, and they have an injunction on

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a bill filed by the defendant to ſtay our proceedings at law in ejectment, and the plaintiff hath a verdict for another part of the eſtate upon the ſame title.

After debate, the demurrer was over-ruled.

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1 April 1729.

Counteſs of *Sutherland* v. *Northmore* et è contra.

(Reg. Lib. A. fol. 431.)

A feme covert having a power under her marriage ſettlement to create a term, and to raiſe money after the death of her huſband, and being in diſtreſs, executes that power in the life time of her huſband, and aſſigns her intereſt for a trifling conſideration. The judges, upon a caſe ſent to them were of opinion, it was a good execution of the power. And ſo this Court held it on the judges' certificate, but gave the plaintiff liberty to redeem, on payment of the money really and *bonâ fide* advanced, with intereſt, by a given day, or the plaintiff to be foreclоſed.

THE caſe was this: by deed dated 18th *January* 1698, Sir *Thomas Travell* and *Frances* his wife, covenant to levy a fine of certain eſtates of 1,200 *l.* a year, the eſtate of the wife, the uſe of which was to truſtees for 1000 years, to raiſe 2,500 *l.* for Sir *Thomas Travell*, remainder (ſubject to the ſaid term) to the huſband for life, to the wife for life; remainder to the iſſue of the marriage; remainder to the iſſue of Lady *Travell* by any other huſband; remainder to Sir *Thomas Travell* in fee, with power, in caſe Lady *Travell* ſhould have no iſſue, for her by deed or will to charge the premiſes with 1,000 *l.*, and to create a term for the purpoſe, which was to be redeemable on payment of the 1,000 *l.*; but the ſaid 1,000 *l.* was not to be payable until the end of ſix months after the death of Dame *Ann Hodgſon*: with a power likewiſe, in caſe of the death of the huſband in her life time, to charge the premiſes with a further ſum of 2,000 *l.* in like manner.

On the 17th *July* 1703 ſhe executed the power, and in conſideration of 150 *l.* paid to her by *Thomas Northmore*, ſhe charged the premiſes with 1,000 *l.*, 500 *l.* to be paid to him on the firſt day after the end of ſix months

months from the death of the above-named Dame *Ann Hodgſon*, and the remaining 500 *l.* the day after; and for that purpoſe created a term of 2000 years to *Northmore*, to commence immediately after her own death, to be redeemable on payment of 1,000 *l.*, &c. and ſhould the ſaid Sir *Thomas Travell* her huſband die in her life-time, ſhe then charged the 2,000 *l.*, which by her ſettlement ſhe had a power to do, except that the term was to commence immediately from the death of the ſaid Sir *Thomas Travell*, and redeemable in like manner as to the 1,000 *l.*

Counteſs of *Sutherland* v. *Northmore* et è contra.

Sir *Thomas Travell* being dead, the plaintiff in the firſt cauſe, his widow exhibited her bill againſt the ſaid *Northmore*, to be relieved againſt the ſaid aſſignment of her intereſt under the ſaid two powers, offering to repay the 150 *l.* paid to her as the conſideration, with intereſt, charging the ſame to have been obtained from her by ſurpriſe; and when ſhe was under great neceſſity, and diſtreſs, which *Northmore* knew, and being alſo contrary to the agreement between her, and him.

Northmore's croſs-bill was to have the benefit of the aſſignment, and to be paid the 2,000 *l.*

Upon this cauſe coming on to be heard, the Court directed a caſe to be made for the Judges of the Court of King's Bench, and the queſtions to be, whether the ſaid deed of the 17th of *July* 1703 was a good execution of the power reſerved to Lady *Travell* by her ſaid marriage ſettlement to raiſe 2,000 *l.*; and ſuppoſe it was a good execution, then whether the 2,000 *l.* was to be raiſed.

The Judges certified it was a good execution of the power, and that the 2,000 *l.* ought to be raiſed upon the death of Sir *Thomas Travell*.

Upon

Countess of *Sutherland* v. *Northmore* et è contra.

Upon this cause coming on to be heard the above 1st of *April* 1729, upon the Judges' certificate, for further directions; the Court declared the power was well executed, and that the estate was chargeable with the 2,000 *l.*, but with regard to the defendant *Northmore*, that the deed of the 17th *July* 1703 was to be considered only as a security for the 150 *l.* and interest at 6 *per cent.* from the date of the deed till Michaelmas 1714, and from that time at 5 *l. per cent.*; and the Master to compute the interest, and tax *Northmore* his costs; and on payment, *Northmore* to convey, and assign the term, and in default of payment the plaintiff to be foreclosed.

30 Nov. 1729. Mosel. 255. S. C.

Eyles v. *Ward.*

LIBERTY given to amend the inrolment of a decree, although said to be material.

20 July 1729.

Rowe v. *Stuart.*

THE plaintiff, under a common order to amend his bill, on payment of 20 *s.* costs amended his bill; the amendments being long, the plaintiff was ordered to pay 3 *l.* additional costs.

Your

Yow v. *Townſend.*

17 Dec. 1729.

A miſtake in a report made in 1722, and inrolled, ordered to be amended, and the docquetting of the inrolment to be altered accordingly.

THIS came before the Court upon the ſpecial matter of a report, after an enquiry as to a miſtake in a former report of the Maſter in 1722, whereby he had directed the ſum of 300 *l.* to be divided between *William Harris*, and the then defendant *Grace Cole*, and which report, with the decree and proceedings, had been inrolled. The Maſter by his ſubſequent report certified that he had been ſurpriſed by *Harris*, the ſolicitor for *Grace Cole*; that the decree was to pay the money that ſhould be found due to the defendant *Grace Cole*; whereas he had appointed it to be paid to *Grace Cole* and *William Harris*, which was not directed by the decree.

The Court ordered the Maſter to amend the report by ſtriking out *William Harris*, and inſerting defendant for defendants, and the docquetting of the inrolment to be altered accordingly.

Earl of *Litchfield* v. *Roberts* and others.

11 Feb. 1730.

(Reg. Lib. A. fol. 329.)

DEFENDANT *Roberts* brought up by an *alias pluries habeas corpus* for want of his anſwer; and the bill decreed to be taken *pro confeſſo* againſt him.

On the 6th of *March* 1731, the cauſe was brought on to hearing againſt the other defendants, and a complete decree.

Elly

Earl of *Litchfield* v. *Roberts* et al.

Elly v. *Edwards*. Reg. Lib. fol. 494. 30th *May* 1769. Defendant *Edwards* was brought up by an *alias pluries habeas corpus*, and the bill decreed to be taken *pro confeſſo* againſt him. On the 8th *June* 1769 a complete decree was pronounced.

Tandy v. *Holme*, 12 *July* 1773. The like againſt the defendant *Holme*, and he was ordered to be remanded.

Woodman v. *Smith*, Eaſter Term 1779. The like againſt defendant *Smith*.

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15 May 1730.

Oſman v. *Fitzroy*.

A WITNESS who had been ſerved with a ſubpœna *ad teſtificandum*, ordered to attend, and be ſworn in four days and be examined, or to ſtand committed.

The like order { in *Arnot* v. *Biſcoe*, 12 *May* 1747. *Owen* v. *Pinkard*, 4 *Feb.* 1756. *Rye* v. *Tenterden*, 26 *March* 1765.

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30 June 1730.

Lady *Kilmurry* v. *Crew*.

APPLICATION, that in taking the accounts under the decree, the examination of the plaintiff taken before the Maſter might be allowed as evidence in her diſcharge, was refuſed.

Commiſſioners

Commiſſioners of Charitable Uſes v. *Hicks*.

7 July 1731.

Contempt towards Commiſſioners of Charitable Uſes puniſhable by the Great Seal.

THE queſtion was, whether contempt againſt Commiſſioners of Charitable Uſes was puniſhable in this Court.

It was inſiſted it was, for that under a commiſſion of bankruptcy the orders of the commiſſioners have been enforced by the Great Seal; ſo in commiſſions of lunacy, the Great Seal hath interpoſed to enforce the orders of the commiſſioners: that the authority of the commiſſioners in the preſent caſe is derived from the Great Seal, and as ſuch, any contempt of it is puniſhable by the Great Seal; and ſo it was allowed.

Robſon v. *Cranwell*.

18 Dec. 1731.

Bill diſmiſſed, owing to the neglect of the plaintiff's ſolicitor, and the order of diſmiſſion enrolled: the inrolment diſcharged, and the cauſe reheard.

THE plaintiff's ſolicitor having received money on account, and likewiſe money to fee counſel at the hearing, neglected to deliver briefs, and the bill was diſmiſſed for want of the plaintiff's appearing, and the order for diſmiſſion inrolled.

The plaintiff applied the above day to have the cauſe reheard, which was ordered, and the inrolment ordered to be diſcharged upon payment of the coſts of the day, and of the ſubſequent coſts.

Edgill

23 Jan. 1732.

Edgill v. *Brown.*

Coſts taxed become a judgment debt, and though perſonal, do not drop with the party; but the ſuit may be revived for the coſts only.

Vid. Temple v. Row ſup.

BILL by *John Brown* deceaſed againſt *Edgill*, the plaintiff in this cauſe: the bill, upon hearing the cauſe, was diſmiſſed with coſts: the Maſter taxed and made a report of the coſts.

The plaintiff applied to have the coſts retaxed, which was ordered, but the report already made was to ſtand as a ſecurity for the coſts, in caſe the plaintiff died before the retaxation.

The plaintiff did die, and thereupon the preſent plaintiff filed a bill of revivor againſt the repreſentative of the late plaintiff, merely for the coſts.

It was objected by the defendant, that the coſts being perſonal, they dropped with the party, and that a ſuit could not be revived for coſts only.

Lord Chancellor.—Where coſts are taxed, they become a judgment debt; and as at law you may revive a judgment, ſo you may here. It would have been otherwiſe, had the coſts not been taxed. And his Lordſhip therefore ordered the ſuit to be revived.

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23 Feb. 1732.

Brown v. *Brown.*

PERSONS appointed to hold the Courts of Manors, and the Court Rolls, &c. ordered to be delivered to them for the purpoſe.

Davy v. *Acland*, 6 *Feb.* 1744.
Compton v. *Compton*, 22 *Jan.* 1760. } Similar orders.

Farnham

Farnham v. *Burroughs.*

13 March 1753.

A creditor having come in under a decree, and prayed a commiſſion to prove his debt, though he went no further, held to have made his election, and not permitted to proceed at law to recover his debt.

A DECREE for an account of debts, and for creditors to come in before the Maſter, and debts to be paid out of the perſonal eſtate, and real eſtates deviſed for that purpoſe; if deficient, liberty to apply when the defendant, the heir at law, an infant, attained twenty-one, to have the deficiency raiſed out of legal aſſets deſcended. The defendant, who was a bond creditor, came in under the decree, and obtained a commiſſion to prove the debt, but finding the perſonal eſtate, and equitable aſſets inſufficient, he went no further, but when the infant attained twenty-one, he brought an action againſt him on his bond. The heir filed a bill for, and prayed an injunction.

Lord Chancellor.—The defendant having come in under the decree in the ſaid cauſe hath ſubmitted to the terms of it, and hath, in effect, made his election to proceed in this Court, therefore I will not ſuffer him to proceed at law to recover his debt, and let an injunction iſſue.

James v. *Dore.*

25 March 1734.

If the ſuit abates, and the defendant (though a defendant in the original cauſe) abſconds to avoid being ſerved, the act of 5 Geo. 2. muſt be purſued, as if he had been a new defendant.

AFTER a decree, and proceedings under it before the Maſter, *William Conner*, one of the defendants, died, and adminiſtration having been granted to the plaintiff, he filed a bill merely to revive againſt *Dore*, the ſurviving defendant. *Dore* abſconded to avoid ſervice of a ſubpœna to revive: the plaintiff purſued the ſteps directed by the act of 5 *G.* 2. c. 25.

to

James v. *Dore.*

to render proceſs effectual againſt perſons that abſcond, &c.

And on hearing the cauſe this day on the bill of revivor, the Lord Chancellor decreed that the former decree and proceedings ſhould ſtand revived, and the ſame be carried into execution.

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1 May 1734.
3 P. Wms. 255.
S. C. 2 Eq. Abr. 14. S. C.

Gibbs v. *Cole.*

(Reg. Lib. A. fol. 338.)

UPON application to diſſolve an injunction upon coming in of the anſwer, which was to ſtay the printing, and publiſhing of a book, the Lord Chancellor ſaid, it was proper to allow affidavits to be read in ſupport of the injunction; and affidavits were read.

Note.—The order for the injunction is dated the 28th of *February* 1733, Reg. Lib. A. fol. 194, and appears to be founded on the affidavit of the plaintiff.

On ſhewing cauſe to continue it, the firſt day of *May* 1734, not only the affidavit of the plaintiff which was read when the injunction was granted, but alſo an affidavit of *Job Mills*, and of *John Baldoch* were read in ſupport of it.

If affidavits were allowable in a caſe where a plaintiff may have ſatisfaction in ſome degree againſt a defendant by making him account for the profits, *a fortiori* there is reaſon to allow them to be read where no reparation in damages can be made, as for cutting down trees planted, or growing for pleaſure, ornament, or ſhelter.

Mallock

Mallock v. *Galton.*

18 April 1735. 2 Eq. Abr. 11. S. C. 3 P. Wms. 352. S. C.

THE bill was brought to be let in to redeem, alledging, that the money due on the mortgage was greatly overpaid by the perception of the rents of the mortgaged premiſes: the defendant pleaded in bar a decree for a foreclosure ſigned, and inrolled, under which the premiſes had been abſolutely foreclosed. The plea, on argument, was allowed.

Morſe v. *Roach.*

7 Geo. II. 2 Stra. 961. S. C.

UPON hearing counſel for the deviſee and for the Regiſter of the Prerogative Court, it was ordered that on the deviſee's giving ſecurity, to be approved by the Judge of the ſaid Court, to return the will in ſix weeks from the delivery thereof, the will ſhould be delivered to the deviſee to be produced at the commiſſion.

The like order in *Frederick* v. *Aynſcombe*, 28th *March* 1738.

Mendes v. *Barnard.*

23 May 1735.

THIS came before the Court on a demurrer to ſo much of the plaintiff's bill as prayed a commiſſion, the bill only praying a commiſſion to enable the plaintiff to go to law: it was ordered to ſtand over to

Mendes v. *Barnard.*

produce precedents. *Fornward* v. *Thompſon*, 14th of *March* 1731; and another order in the ſame cauſe, dated 4th of *May* 1732, being produced, after hearing counſel on both ſides, the demurrer was over-ruled.

Moore v. *Moore.*

28 June 1755.
2 Veſ. 596. S. C.

A SUPPLEMENTAL bill, in nature of bill of review, cannot be heard until a petition to rehear the original cauſe is preſented, to come on at the ſame time; and ſo it was laid down by the Lord Chancellor: for though the plaintiff ſhould be relieved upon his ſupplemental bill, the decree cannot be altered, but on the rehearing.

Spettigue v. *Carpenter.*

(Reg. Lib. B. fol. 492.)

2 July 1735.
2 Eq. Abr. 93. S. C. 3 P. Wms. 361. S. C.

BONDS of ſubmiſſion, dated 18th of *September* 1731. An award was made in conſequence of them the 7th of *October* following. On the 9th day of *November* 1732 the bonds were made an order of Court. The plaintiff brought his bill to be relieved againſt the award charging that the ſame was obtained by corruption.

Submiſſion bond under the ſtat. of 9 & 10 W. 3. not to be made an order of Court after the award is made.

The cauſe was heard this day.

Lord Chancellor.—It is not within the ſtatute of the 9th and 10th of King *William* the Third, c. 16, to make bonds of ſubmiſſion, an order of Court after the award is made. And, therefore, let the award be ſet aſide, and the ſubmiſſion bond be delivered up to be cancelled:

cancelled: and let all proceedings at law on the bond or under the order of the 9th of *November* 1732, be ſtayed. *Spettigue* v. *Carpenter.*

The King v. *Horne.* 10 Aug. 1736.

(Reg. Lib. A. fol. 476.)

HORNE, a bankrupt, had been committed to Newgate by the commiſſioners in the commiſſion againſt him, for not anſwering queſtions they put to him. On the above day, he applied for a *habeas corpus*, ſtating that he was ſtill in Newgate, but in that weak ſtate of mind as not to be able to anſwer: and in regard he was entitled by virtue of ſtat. 31 *Car.* 2, to a writ of *habeas corpus*, it was prayed and ordered, that an *habeas corpus* ſhould iſſue, but it was directed to the Keeper of his Majeſty's Gaol of Newgate.

Smith v. *Barnes.* 9 Dec. 1736.

DEMURRER to bill allowed. The plaintiff afterwards applied to amend, which was refuſed, the Lord Chancellor ſaying, that, after demurrer to the whole bill was allowed, the bill was regularly out of Court, and there was no inſtance of liberty to amend it.

22 May 1737.

Dillon v. *Francis.*

(Reg. Lib. B. 310.)

ON a certificate of the Maſter to whom it was referred, that the bill was not ſigned by counſel, the bill was ordered to be taken off the file, and ſuppreſſed; and the plaintiff to pay the defendant coſts to be taxed.

3 June 1737.

Attorney General v. Duke of *Ancaſter.*

INJUNCTION to ſtay a tenant in poſſeſſion, not a party, from committing waſte.

10 June 1737.

Ridout v. Earl of *Plymouth.*

PERSONS named by the parties appointed receivers upon their own recognizance only. And ſo in Counteſs of *Carliſle* v. Earl of *Carliſle,* 21ſt *December* 1761, by Sir *Thomas Clark* M. R.

16 June 1737.

Sambroke v. *Ekins.*

AN attachment having iſſued againſt the defendant for want of his anſwer, it was executed, and the ſheriff returned a *cepi corpus*, and thereupon the meſſenger was ordered to bring the defendant to the bar of the Court, but the defendant not being to be found, the Serjeant at Arms was ordered to go.

John

John Bodicoate v. *Eliz. Steers* Widow, and others. 18 July 1737.

(Reg. Lib. B. 613.)

Decree for partition of an advowſon.

THE bill was to have a partition of the advowſon of *Weſterham* in *Kent*, by alternate preſentations.

Per Curiam.—Declare the plaintiff is entitled to have a partition of the vicarage of *Weſterham* into moieties to preſent by alternate turns, and decree a partition to be made thereof accordingly between the plaintiff, and defendant; and for the making of ſuch partition, the plaintiff and the defendant are mutually to execute conveyances to each other, ſo that the plaintiff may hold one moiety of the advowſon to him and his heirs, and the defendant the other moiety to her and her heirs, as tenants thereof in ſeveralty reſpectively: and in ſuch conveyance let a clauſe be inſerted, that the plaintiff and his heirs, and the defendant and her heirs ſhall preſent by alternate turns; and the Maſter to ſettle the conveyance if the parties differ, and the expence and charge of the conveyance to be borne equally. And it appearing that *John Steers*, under whom the defendant claims, had preſented upon the laſt avoidance, let the plaintiff preſent on the next avoidance, being the firſt turn from that time: and no coſts on either ſide.

7 Aug. 1737.

Biſhop of *Rocheſter* v. *Knapp*.

THE bill had been decreed to be taken *pro confeſſo*, under the act of the 5th of *Geo.* 2. to render proceſs effectual againſt perſons who abſcond. The defendant, within the ſeven years, applied under the ſaid act, and obtained an order for liberty to put in an anſwer, and to bring on the cauſe again to be heard on his paying the coſts occaſioned by his default: but he was firſt to give ſecurity to anſwer coſts, to be approved by the Maſter.

The cauſe was again heard in Hil. T. 1737—8 (Reg. Lib. A. fol. 319.).

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7 Nov. 1737.

Palmer v. *Mayſent*.

Lord Thurlow C. having ſome doubt reſpecting the caſe as reported in 1 Atk. 505. by the name of Palmer v. Maſon, I was directed by him to look into and ſend him a ſtate of the caſe as entered. The decree not being entered, I extracted the following ſtatement from the records of the bill and anſwers. J. D.

THE bill ſtates, the plaintiffs, *John* and *Suſanna*, intermarried in 1720; that *John Mayſent*, the father of *Suſanna*, was ſeiſed of freehold and copyhold eſtates of 300 *l.* a year, beſides a large perſonal eſtate: that he ſettled thoſe eſtates, and made a proviſion of 1000 *l.* for the ſaid *Suſanna* by ſome deed, or will; that he had been induced by fraud and impoſition, to deſtroy or cancel thoſe inſtruments, and to make a will *in extremis*, whereby he gave the ſaid plaintiff *Suſanna*, his daughter, 10 *l.* only, beſides ſome furniture; to the plaintiff *John Payſent Palmer* the infant 500 *l.*, to

Legacies to be paid at 21: if the infants die before, to the executor, who is appointed reſiduary legatee. The Court will not order the legacies to be raiſed and ſecured.

be

be paid at twenty-one; and to the plaintiff *Suſanna Palmer* the infant 100 *l.*, to be paid at twenty-one, or marriage with conſent. The bill prays, amongſt other things, to have the ſaid two legacies of 500 *l.* and 100 *l.* ſecured for the benefit of the infant legatees, and to have the intereſt applied for their maintenance.

The defendant by his anſwer admits the teſtator made a will, dated 8th of *Auguſt* 1723, whereby he gave 500 *l.* to the plaintiff *John Payſent Palmer*, to be paid at twenty-one; if he died before, he gave the ſaid legacy to the defendant; and 100 *l.* to the plaintiff *Suſanna* the infant, to be paid at twenty-one, or marriage with conſent as therein mentioned; and 10 *l.* for mourning, and ſome furniture, to the plaintiff *Suſanna* the wife, and appointed the defendant ſole executor, and reſiduary legatee.

Admits he proved the will, and admits aſſets; and ſays he paid the 10 *l.* and delivered the things ſpecifically bequeathed to the plaintiff *Suſanna* the wife; but inſiſts upon his right to keep the ſaid legacies of 500 *l.* and 100 *l.* in his hands without paying, or being accountable for intereſt.

The cauſe came on to be heard before Lord *Hardwick* C. on the 7th of *November* 1737; and it appears by the minutes, his Lordſhip, as to the two legacies of 500 *l.* and 100 *l.* given to the two infant plaintiffs, ordered, they ſhould be at liberty to apply to the Court for raiſing and paying the ſame, and for further directions, when they ſhould reſpectively attain the age of twenty-one years.

12 Feb. 1738.

Royal Exchange Aſſurance Company v. *Barker.*

A COMMON injunction for want of an anſwer extended by order to ſtay trial on the anſwer's being filed: the defendant applied to diſcharge the order: the plaintiff alledged that the anſwer was inſufficient, and that he had taken exceptions to it.

A queſtion aroſe with reſpect to the courſe of the Court, whether the defendant might move to diſcharge the order before he moved to diſſolve the injunction, or the plaintiff, of courſe, ſhew exceptions to prevent the defendant's from moving to diſſolve the injunction. The Lord Chancellor thought the exceptions taken merely for delay, and therefore diſcharged the order.

Cooper v. *Thornton.*

ONE *Powel* claiming to have a mortgage on an eſtate (of which a receiver was appointed by order of this Court), prior to the plaintiff's right, by order dated 11 *June* 1736, entered Reg. Lib. A. 337. he was to come in, and be examined *pro intereſſe ſuo*, and the plaintiff was to exhibit interrogatories for the purpoſe.

The claimant neglecting to put in his examination, by order dated 10th *February* 1737, Reg. Lib. A. 67. he was ordered to put in his examination, and to procure a report in a fortnight. He put in his examination, and the Maſter made his report.

There is not any order entered for the Maſter to look into the examination and depoſitions, and to certify what title the claimant had made out, as in the preceding caſe. J. D.

Order,

Order, dated the 2d *June* 1737, to ſet the cauſe down for directions on the report. *Cooper* v. *Thornton.*

On the 22d *July* 1738, entered Reg. Lib. A. 629. the cauſe came on to be heard on the report, when, after hearing the orders, report, and the proofs, and what was alledged by the counſel on both ſides, his Lordſhip confirmed *Powel*'s claim, and ordered the plaintiff to pay *Powel* his coſts from the 10th of *February* laſt.

Aſhburnham v. *Kirkhall.* 11 Dec. 1738.

A CASE was directed for the opinion of the judges. The facts to be ſtated in it were ſtated in the order by the Court, without referring it to the Maſter to ſettle the caſe.

The ſame was done in *Harman* v. *Spotteſwood*, *June* 1773.

Attorney General, at the relation of the Mayor, &c. of *Tenby*, v. *Waters.* 13 March 1739.

UPON motion alledging that a ſubpœna had iſſued to compel the relators to pay the defendant the ſum of 19 *l.* 18 *s.* 6 *d.*: that *Richard Williams* Eſq. the mayor, was on the 26th of *February* laſt perſonally ſerved with the ſaid ſubpœna, and a demand was then made of the ſaid ſum, which had not been paid: it was therefore ordered that a *diſtringas* ſhould iſſue againſt the ſaid relators, to compel them to pay the ſaid ſum of 19 *l.* 18 *s.* 6 *d.*

April 1739.

Duke of *Marlborough* v. Ducheſs of *Marlborough*.

ON affidavit of the danger in bringing an infant who lived in town into Court to have a guardian aſſigned, a commiſſion was ordered for the purpoſe.

Mich. T. 1749. 1 Atk. 628. S. C.

Sheffield v. Duke of *Bucks*.

INJUNCTION granted to ſtay proceedings in the Spiritual Court, to invalidate a will, and to call in probate.

15 Nov. 1739.

Wilkinſon v. *Coker*.

ORDER fixing a time for the defendant to appear to the plaintiff's bill, purſuant to the act of the 5th *Geo.* 2. to render proceſs effectual, &c.: the church at which it was to be fixed being pulled down to be rebuilt, the time was enlarged for three months.

A. D. 1739, 1741, 1741. 2 Atk. 378. S. C.

Attorney General v. *Montgomery*.

ELIAS Turner by his will deviſed his eſtates to *Sawbridge* and others, in truſt for the particular purpoſes in his will. A bill is filed to eſtabliſh it, and to have the truſts executed: the heir at law diſputing the ſanity of the teſtator.

On hearing the cauſe, an iſſue *deviſavit vel non* was directed, which was tried, and a verdict in favour of the will. Two new trials were granted, on each of which there was a like verdict. Attorney General v. *Montgomery*.

The cauſe was afterwards heard on the equity reſerved, and the will was eſtabliſhed, and the truſts decreed to be performed, and executed.

The heir at law afterwards bringing an ejectment, the relators filed a bill for, and obtained a perpetual injunction.

The defendant *Montgomery*, the heir at law, afterwards intermarrying with the daughter of *Sawbridge*, the principal acting truſtee, letters and other papers, which ſtrongly proved the inſanity of the teſtator, were put in the way of Mrs. *Montgomery*, and upon the diſcovery of this new evidence, the defendant *Montgomery* preferred a petition, and obtained leave to file a ſupplemental bill in nature of a bill of review. And upon another trial directed in the cauſe, the teſtator was found to have been inſane, and his will in conſequence ſet aſide.

Uſborne v. *Uſborne*.

7 March 1740.

Mortgagor reſtrained from cutting down timber on the mortgaged premiſes.

THE order of this date ſtates, that the plaintiff, under an aſſignment, was entitled to a mortgage term of 500 years of two farms and premiſes, for ſecuring 630*l.* and intereſt from the defendant *Uſborne*, ſubject to redemption: that *Uſborne* had ſold the timber ſtanding and growing on the mortgaged premiſes to the defendant *Bathurſt*: that he had entered on the mortgaged premiſes,

Uſborne v. *Uſborne.*

premiſes, and cut down ſeveral trees, and threatened to cut down more, by means whereof the mortgage ſecurity would be leſſened. It was therefore ordered that an injunction ſhould be awarded to ſtay the defendants, &c. from committing any waſte or ſpoil on the premiſes, &c. until anſwer and further order.

N.—A ſimilar order in *Hopkins* v. *Monk*, A. D. 1742, and in *Uvedale* v. *Uvedale*, 7 *March* 1740; and by Lord *Thurlow* C. in *Groſs* v. *Chilton*, 25 *April* 1782, after a doubt and conſideration, thinking it was the mortgagee's fault in permitting the mortgagor to continue in poſſeſſion.

14 May 1740.

Read v. *Ward.*

THOUGH the affidavit on which an attachment is founded be not filed at the time of iſſuing the attachment; if it be filed before the return, it will not be irregular.

Eaſt. 1740.

Tuffnell v. *Page.*

IT was laid down by Lord *Hardwick* C. that the truſt of a copyhold eſtate will paſs by a will not atteſted according to the Statute of Frauds, as a copyhold eſtate ſurrendered to the uſe of a will will do; for equity ought to follow the law, and make it at leaſt as eaſy to convey a truſt, as a legal intereſt.

Garnum

Garnum v. *Marſhal.*

(Reg. Lib. A. fol. 9.)

6 Nov. 1740. 2 Atk. 70. under the title of Smith v. Marſhal, 8 Nov. 1740.

Infants ſecreted to prevent their being ſerved with a ſubpœna to appear and anſwer, ſervice on their mother good.

UPON this cauſe coming on to be heard, it was objected, the three infant daughters of the defendant *Mary Enoch* were not parties. The cauſe was ordered to ſtand over with liberty to amend by adding parties, the ſaid infants in particular. The plaintiff amended his bill accordingly, and endeavoured to ſerve the infants with a ſubpœna to appear and anſwer, and applied to their mother to learn where they were to be met with, which ſhe not only refuſed, but ſaid ſhe had ſent them into the country, and would not tell where. Upon affidavit of the facts, and of notice of the motion, the Lord Chancellor ordered, that ſervice of a ſubpœna for the infants to appear, on the defendant their mother, ſhould be deemed good ſervice on the ſaid infants.

William

27 Jan. 1741. 2 Eq. Ca. Abr. 170. S. C. Barn. C. 371. S. C.

William Lamplugh Clerk, Plaintiff.

James Hebden Eſq., Sir *Walter Calverley*, and *William Wrighton*, Truſtees in the plaintiff's marriage ſettlement, the Defendants; and *Elizabeth Lamplugh*, the plaintiff's wife, and *Elizabeth Lamplugh* an infant, the plaintiff's only child, added Defendants by amendment.

(Reg. Lib. B. fol. 158.)

Cauſe ordered to ſtand over to make perſons ſuppoſed to have an intereſt parties, who afterwards, on the further hearing, appeared not to have any.

THE plaintiff was ſeiſed of lands in *Lubberſtone*: by agreement, dated 29th of *January* 1738, between him and the defendant *Hebden*, the plaintiff, in conſideration of 4950 *l.*, to be paid before the 1ſt day of *Auguſt* then next, covenanted that he and his wife, and all claiming any eſtate in the ſaid premiſes, would convey to the ſaid defendant *Hebden* and his heirs, all the ſaid premiſes, and deliver poſſeſſion thereof on or before the 25th day of *March* then next.

In purſuance of the agreement, *Hebden* was let into the poſſeſſion, and received the rents, and did acts of ownerſhip.

The plaintiff applied to the defendant *Hebden* to perform the agreement, which he refuſed, inſiſting the plaintiff was not ſeiſed in fee ſimple of the premiſes, for that, by indentures of leaſe and releaſe, dated 9th and 10th *June* 1737, made upon the marriage of the plaintiff with *Elizabeth* his now wife, part of the ſaid lands were conveyed to the defendants *Calverley* and *Wrighton*, and their heirs, to the uſe of the huſband for life, remainder to truſtees to preſerve contingent remainders; remainder to the wife for life;

life; remainder to the firſt and other ſons in tail male; remainder to the daughters in tail general, with the ultimate remainders in fee to the plaintiff; and that by ſuch ſettlement the plaintiff's wife had power to charge ſuch lands with 500 *l.* in caſe ſhe had no iſſue inheritable to the ſaid lands. The plaintiff by his bill charged, that ſuch ſettlement was ſubject to the following conditions; that if the plaintiff ſhould ſettle other freehold lands of 100 *l.* a year, clear of all reprizes, to the ſame uſes, then all the eſtates before limited of the eſtate in *Lubberſtone* ſhould ceaſe: and the defendants the truſtees ſhould be ſeiſed of the ſaid lands in *Lubberſtone* to the uſe of the plaintiff in fee: and that he had, by indentures of leaſe and releaſe of the 8th and 9th of *May* 1738, conveyed to the ſaid truſtees ſeveral freehold lands, to the ſame uſes as the *Lubberſtone* lands were ſettled: and that the defendant *Hebden* had notice of ſuch exchange before he entered into the articles for the purchaſe: and that by other indentures of leaſe and releaſe, dated 5th and 6th of *July* 1739, he conveyed other meſſuages and lands to the ſaid truſtees, to the ſame uſes as the *Lubberſtone* lands were ſettled; and that the eſtates conveyed or exchanged were of the yearly value of 130 *l.* beyond reprizes: and therefore the plaintiff inſiſted, that he was enabled to convey the ſaid lands in ſettlement to the defendant *Hebden*; but that he ſtill refuſed to perform the agreement: the bill therefore prayed that the defendant *Hebden* might be decreed to perform the agreement to pay the 4950 *l.*, the conſideration money.

The cauſe came on before Lord *Hardwicke* C., the 6th of *March* 1740, when an objection was made, that

Lamplugh v. *Hebden* et al.

that the defendant the wife, and the child, were not parties.

On the part of the plaintiff it was argued, that the plaintiff having the power to exchange the lands in ſettlement, and having ſo done, neither the wife nor her child had any intereſt in the *Lubberſtone* eſtate, and that therefore they were not neceſſary parties. But Lord *Hardwick* C. held, that in fact they were intereſted to ſee that the lands ſettled in lieu of the *Lubberſtone* lands were of equal value to thoſe lands; and if ſo, that theſe lands were ſettled to the ſame uſes; and therefore ordered the cauſe to ſtand over, with liberty for the plaintiff to amend his bill by adding parties, which he did by adding the defendants his wife and only child; and by his amended bill prayed, that the ſeveral uſes created by the ſettlement of the 10th of *June* 1737 might ceaſe and determine, according to the condition therein mentioned, except the uſe therein limited to the plaintiff in fee: and that the ſettlement of lands compriſed in the indenture of the 8th and 9th of *May* 1738, and 6th of *July* 1739, might be accepted and eſtabliſhed in lieu thereof.

The defendant *Hebden* by his anſwer admitted the agreement, and that he had been let into poſſeſſion; and that he had dug clay on the premiſes: that the plaintiff had afterwards ſent him the original ſettlement, but conſidering the nature of the plaintiff's title, he ſubmitted whether he ought to be forced to proceed in his purchaſe.

The defendant the wife, by her anſwer admitted the original ſettlement and the ſubſequent ſettlements ſtated in the bill, and that ſhe willingly conſented to the exchange, and that the ſame was made with her

her privity, and ſubmitted to be bound by them, if the Court thought fit. *Lamplugh* v. *Hebden* et al.

The defendant, the infant, by her anſwer ſubmitted herſelf to the care and protection of the Court.

The Lord Chancellor referred it to the Maſter to ſee if a good title could be made by the plaintiff to the defendant *Hebden*, of the eſtate compriſed in the contract, and reſerved coſts, and further directions.

The Maſter reported the plaintiff could make a good title.

On the 18th *October* 1742 (*a*), the cauſe came on to be heard on the report, and the contract ordered to be performed, and all parties to join, &c. (*a*) Reg. Lib. B. fol. 303.

Ex parte *Berry*, a bankrupt. April 1741.

THE petition ſtated, that about ſixteen months before the commiſſion of bankruptcy iſſued againſt the petitioner, he filed his bill againſt the defendant; that his aſſignees not reviving, the defendant had obtained the common order to diſmiſs the bill for want of proſecution, with coſts; and therefore he prayed to be relieved from the coſts.

The Lord Chancellor diſmiſſed the petition.

Mackworth v. *Briggs*. 6 May 1741. 2 Atk. 182. S. C.

THE Maſter reported the plaintiff's bill to be pertinent exceptions: to the report, for that he ought to have found it to be impertinent, (without ſpecifying the particulars in which it was impertinent), allowed.

17 July 1741.

Knightly v. *Deacon.*

IF the anſwer is reported ſufficient, and upon exceptions to the report is held by the Court to be inſufficient, the defendant is not to pay 40 *s.*, the coſts of an inſufficient anſwer, as was ſaid by *Robert Holford* Eſq. the then ſenior Maſter, to be the courſe of the Court, and admitted to be ſo by the ſworn Clerks in Court.

24 July 1741.

King v. *Smith.*

THE plaintiff having obtained a verdict at law againſt the defendant, and the defendant threatening to leave the kingdom before the plaintiff could obtain judgment, the plaintiff filed his bill to have the benefit of the verdict, and immediately thereupon moved for a writ *ne exeat regno:* the Lord Chancellor ſaid, there was not an inſtance of ſuch a writ having iſſued, when it is not a mere equitable demand, and therefore denied the motion.

12 Nov. 1741.
2 Atk. 218.
S. C.

Long v. *Burton.*
Burton v. *Long.*

Original bill is to be firſt anſwered, but if after a croſs-bill filed, the plaintiff in the original bill amends it in matters material, he loſes his priority.

THE plaintiff in the original cauſe having taken exceptions to the defendant *Burton*'s anſwer, while thoſe exceptions were under reference, applied for, and obtained an order for time to anſwer the croſs-bill, until the plaintiff in that cauſe ſhould put in a ſufficient anſwer to the original bill.

Long v. *Burton* et è contra.

The anſwer was reported inſufficient, and then the plaintiff in the original cauſe obtained an order that the defendant might anſwer the amendments and exceptions at the ſame time. The defendant anſwered the exceptions, and then the plaintiff amended his bill by adding forty-two ſheets of new matter.

Upon an application by the plaintiff in the croſs-bill to diſcharge the order obtained by the plaintiff in the original bill for time to anſwer the croſs-bill, until there was a ſufficient anſwer to the original bill, a queſtion aroſe, whether the original bill ſhould retain its priority.

Lord Chancellor.—I am of opinion, the determination in the caſe of *Steward* v. *Roe*, 2 *P. Wms.* 435. is right, but this goes a ſtep further: the plaintiff by his amendment hath loſt his priority, and therefore let the order be diſcharged.

Mayor of *London* v. *Saunders*.

12 Dec. 1741.

(Reg. Lib. B. 40.)

THE defendant being in contempt to an attachment for want of his anſwer; interrogatories ordered to be exhibited to examine him touching his contempt.

14 Feb. 1742.

Walmſley v. *Elliot.*

IT was laid down by Lord *Hardwicke* C. as a rule, that the defendant cannot give rules to paſs publication, until the plaintiff hath been in default one term after the cauſe is at iſſue.

14 May 1742.

Pilkington v. City of *York.*

AN injunction granted to ſtay proceedings on an indictment for a treſpaſs; two bills having been filed by the plaintiff and defendant in this Court, to determine their right to the fiſhery in the preſent caſe.

3 May 1742.

Bedford v. *Wharton.*

(Reg. Lib. A. fol. 287.)

LIBERTY given to the defendant to amend his anſwer by inſerting and adding facts.

28 June 1742.
2 Atk. 324.
S. C.

Bennet v. *Wade.*
Jones v. *Wade.*

(Reg. Lib. A. fol. 515.)

Fraud vitiates a deed *in toto*, though perſons in no wiſe privy to, or concerned in the fraud, are beneficially interested under ſuch deed.

SIR *John Leigh* Baronet, of *Addington* in *Surry*, was ſeiſed in fee of the manor of *Addington*, and other real eſtates in *Surry*, and alſo of other real eſtates in *Middleſex* and *Kent*, of the yearly value of 2700*l.*; and though not in ſuch a ſtate as to be found a lunatic,

tic, yet his mind was ſo weak that he was eaſy to be impoſed upon. The defendant *Wade*, who was a ſurgeon and an apothecary, and attended him and his family, took advantage of it, and having introduced his daughter, aged about ſixteen years, to Sir *John*, who was then about ſixty, and having made him drunk, in that ſtate procured a Fleet parſon, to marry them, and then prepared a ſettlement in favour of his daughter, which he prevailed on Sir *John* to execute.

She dying ſoon after, he procured Sir *John* to execute a will in his favour, and to appoint him the executor, and alſo to execute indentures of leaſe and releaſe, dated the 9th and 10th of *September* 1737, in corroboration, as he alledged, of the will. Sir *John Leigh* dying, *Wade* obtained probate of the will.

The plaintiffs *John Bennet* and *Henry Spencer*, who had married two ſiſters, the co-heireſſes of Sir *John Leigh*, and whom *Wade* would never permit to ſee Sir *John*, having kept conſtantly a watch over them, took the neceſſary ſteps, and procured the probate to be recalled.

Upon this *Wade* ſet up the above deeds of the 9th and 10th days of *September* 1737, under which the defendants claim beneficially, and they entered on the eſtates: by which deeds Sir *John* is made to convey all his eſtates to the annual value aforeſaid to truſtees, to the uſe of himſelf for life; remainder to truſtees to preſerve, &c; with remainder, as to one moiety of the *Surry* eſtates, to the defendant *Francis Leigh* for life; remainder to his firſt and other ſons in tail male; remainder to his daughters in tail; and in default of ſuch iſſue to the defendants *Jaſper Jones* and *Frances*

Bennet v. *Wade* & *Jones* v. *Wade*.

his wife, for their reſpective lives; with remainder to their firſt and other ſons in tail male; with remainder to their daughters in tail: and as to the other moiety of the ſaid *Surry* eſtates, ſubject to a term of 500 years for raiſing 5000 *l.* for the portions of the younger children of the ſaid *Jones* and his wife, the like limitations as the other moiety; and as to the eſtates in *Middleſex* and *Kent* (which were of the annual value of one moiety of the whole eſtates), after the death of Sir *John Leigh*, to the ſaid defendant *Wade* in fee ſimple.

Sir *John Leigh* died the 16th of *November* 1737.

To ſet aſide the deeds, the bill in the firſt cauſe was filed.

The bill in the ſecond cauſe filed by the *Jones'* and their children, and the *Leighs*, was to eſtabliſh the ſaid deeds.

The cauſes came on to be heard on the 26th of *May*, and were in hearing the 19th, 21ſt, 22d, 23d, and 28th *June* 1742.

On the part of the plaintiffs in the ſecond cauſe, and of the defendants in the firſt, it was argued, that whatever fraud or impoſition had been practiſed on Sir *John Leigh* by the defendant *Wade*, they were not privy to, or in anywiſe concerned in it, and ſome of them could not, for they were infants; and it would be hard to involve the innocent with the guilty, and puniſh them by ſetting aſide the deeds *in toto*.

On the part of the plaintiffs in the firſt cauſe, the co-heireſſes and their huſbands, it was argued, that the deeds were founded in fraud, and being ſo, it vitiated the whole.

And

Bennet v. *Wade* & *Jones* v. *Wade*.

And Lord *Hardwicke* C. was of that opinion, and declared that the deeds dated the 9th and 10th days of *September* 1737, were procured from Sir *John Leigh* by fraud, impoſition, and circumvention, by means of the undue influence obtained by the defendant *Wade* over the weakneſs of Sir *John Leigh*, and that the ſame ought to be ſet aſide: and did order that the bill in the ſecond cauſe ſhould be diſmiſſed, and did order and decree the deeds ſhould be delivered to the plaintiffs in the firſt cauſe to be cancelled, with the conſequential directions to account for rents, &c.

Birt v. *Pitt*.

27 June 1741.

UPON the cauſe being brought to hearing, the bill was retained, with liberty for the defendant to bring an ejectment, which was tried: this day a new trial was granted, upon payment of the coſts of the former.

Legard v. *Sheffield*.

27 July 1742.

The form of an iſſue to try who were the co-heirs of the late Duke of Bucks.

AT the hearing, an iſſue was directed to try who was the heir at law of the late Duke of *Bucks*. The iſſue was, whether the plaintiff, and two of the defendants by name, were the only co-heirs of the late Duke of *Bucks*; and if not, then whether two other defendants by name, or any other, and what perſons were co-heirs of the ſaid Duke jointly with the before-named parties, or any and which of them, and in what ſhares and proportions.

5 May 1747.

Tombes v. *Elers.*

(Reg. Lib. B. 510.)

LORD *Hardwicke* C. took the care of the infant from her teſtamentary guardian, and ordered that ſhe ſhould not marry without leave of the Court.

16 Nov. 1748.
1 Veſ. 157.
S. C.

Roach v. *Garvan.*

(Reg. Lib. B. 32.)

LORD *Hardwicke* C. took the infants from their mother, and put them under the care of Mr. *Potter*, and ordered them not to marry without leave of the Court, and reſtricted them from receiving any letters, or meſſage from particular perſons named in the order.

7 Feb. 1743.
3 Atk. 25. S. C.

Webb v. *Litcott.*

AT the hearing of the cauſe, the defendant the heir at law, who was an infant, made default. The parties were to take ſuch decree againſt him as they could ſuſtain, with a day to ſhew cauſe: but as it was neceſſary the will ſhould be declared to be proved, that the Lord Chancellor might ſo declare it, he ordered the proofs of the will to be read.

Kendal

Kendal v. *Baron.*

9 Feb. 1743.

A *CEPI corpus* being returned on an attachment againſt the defendant for his contempt in not putting in his anſwer, an *habeas corpus cum cauſis* iſſued to bring him to the bar of this Court to anſwer his contempt; but the High Bailiff of the Weſt Riding of *Yorkſhire*, after he had received ſuch writ of *habeas corpus*, diſcharged the defendant under an Inſolvent Act, which had paſſed.

Lord *Hardwicke* C. declared him guilty of a contempt in diſcharging the defendant before he had cleared his contempt; and ordered the High Bailiff to ſtand committed, unleſs he ſhewed cauſe to the contrary, which order was made abſolute on the 6th of *March* following.

Bennet v. *Leigh.*

1743.
2 Atk. 487.
529. S. C.

AN infant, who anſwered by his guardian, neglecting upon attaining twenty-one to apply for leave to put in a new anſwer (*a*), when he did apply it was refuſed.

(*a*) Inſtances in which the Court hath given leave to a defendant, late an infant, to put in a new anſwer on attaining the age of 21 years. Bennet v. Leigh, Hil. 1740. Tancred v. Anniſon, Eaſt. 1752. Ernth v. Lord Baltimore, Hil. 1754.

Anneſley

13 Feb. 1743.

Anneſley v. Earl of *Angleſey*.
(Reg. Lib. A. fol. 18.)

AFFIDAVIT before a Maſter Extraordinary in *Ireland* read in this Court; but affidavit from the Plantations cannot, unleſs under Seal of the Iſland.

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14 Feb. 1743.

Vaughan v. *Vaughan*.

A RECEIVER, on his being appointed, entered into the uſual recognizance with *A.* and *B.* as his ſureties. *A.* procured himſelf to be diſcharged, and the receiver entered into a freſh recognizance; but the time for inrolling being elapſed, it was ordered to be entered *nunc pro tunc*.

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25 Feb. 1743.

Warner v. *Warner*.

THE bill was by the huſband againſt the defendant *Warner* his wife, and another for a diſcovery; and to have effects delivered up by the defendants. The plaintiff and his wife lived together, and ſhe had no ſeparate eſtate. The defendants applied to diſmiſs the bill. But there being a charge in the bill, that the other defendant had placed the property out in truſt for the wife, the Court retained the bill.

Clark

Clark v. *Greenhill* et Ux. 16 March 1743.

DECREE directed lands to be ſold, and all proper parties to join in the ſale. The eſtate being ſold, upon the purchaſer's paying his purchaſe money into the Bank, all parties were ordered to join in the conveyance, and the Maſter to ſettle it. All executed but *Agnes*, the wife of the defendant *John Greenhill*: he was ſerved with a writ of execution of the order; but ſhe could not be ſeen to be ſerved. After hearing counſel on both ſides, it was ordered that ſervice of a writ of execution of the order on the ſaid *John Greenhill*, or on any other perſon belonging to the family, ſhould be good ſervice on the ſaid *Agnes Greenhill*.

Van v. *Price*. 19 Dec. 1743.

AN application, *without* notice to commit the defendant for a contempt in abuſe of the proceſs of the Court. He was ordered to be committed, unleſs he ſhewed cauſe to the contrary on perſonal notice.

On 25th *February* 1743-4, he was ordered to be committed.

The like order was made by Lord *Hardwicke* C. in *Morgan* v. *Jones*, 14th *June* 1745, for beating, &c. the perſon, who ſerved the proceſs.

Jackſon

11 May 1743.

Jackſon v. *Lee.*

A DECREE by default. The defendant on ſhewing cauſe againſt it, objected the want of parties.

His Lordſhip allowed the objection, and the new party was named in Court.

16 May 1743.
2 Atk. 592.
S. C.

Valiant v. *Dodemead.*

WILLIAM Briſtow, one of the ſworn Clerks of this Court, having demurred to being examined as a witneſs, his demurrer upon argument was overruled: a ſubpœna being taken out as of courſe for 5 *l.* the coſts, and he not paying the ſame, and being a priſoner in the Fleet, it was moved that he might be ſuſpended: and he moved that the ſubpœna might be diſcharged, as having iſſued irregularly, there being no particular order awarding the coſts, and this not within the general rule of the Court. Lord *Hardwicke* C. was of opinion, the plaintiff was not entitled to 5 *l.* coſts, as of courſe, or that a ſubpœna might iſſue without an order, and ſet aſide the ſubpœna as irregular; but ordered the ſaid *Briſtow* to pay 5 *l.* coſts.

4 June 1743.

Williams v. *Williams.*

THE defendant on putting in his anſwer may examine witneſſes *de bene eſſe.*

Neal

Neal v. *Billing.*

17 Jan. 1745. Wilkinſon v. Cockell. 18 March 1750. S. P.

IN caſe of a report under a reference for the Maſter to enquire and certify his opinion, exceptions are not to be taken to the report, but it is to be brought before the Court on the report for the Court to judge, and determine.

Venemore v. *Venemore.*

22 June 1743.

UPON the cauſe coming on to be heard, the defendant appeared, and the cauſe going off until a further day, the defendant then made default, and the Maſter of the Rolls pronounced an abſolute decree againſt him. Thinking he ought to have had a day to ſhew cauſe againſt it, he appealed to the Lord Chancellor; and on the appeal coming on to be heard, his Lordſhip was decidedly of opinion, that where a party had paid obedience to a writ, he was not ameſnable to any other proceſs. His Lordſhip cited *Halſey* v. *Smyth*, 3d *July* 1729. *Moſel.* 186.

Saunders v. *Graves.*

1 July 1743.

THE teſtator had given a voluntary bond.

Bill filed for the payment of it.

Payment was ordered, but not till after all the debts of the teſtator for valuable conſiderations were paid; and then to be paid in preference to the legatees.

18th Oct. 1743.

Hamlyn v. *Lee.*

THE eſtate in queſtion being ſequeſtered, and *Cave* and his wife claiming an intereſt by virtue of a mortgage; by an order dated the 12th *February* 1742, (*a*) on the application of the plaintiff, they were to be examined *pro intereſſe ſuo*, and the plaintiff was to exhibit interrogatories for that purpoſe. The examination being taken by order, dated 9th *June* 1743 (*b*), the Maſter was to look into the interrogatories, and the examination, and certify whether *Cave* and his wife had made out any title to the premiſes or not.

(*a*) Reg. Lib. A. fol. 194.

(*b*) Reg. Lib. A. fol. 519.

On the 28th *July* 1743, the Maſter made his report, that the claimants had made out their title. The plaintiff took exceptions to the report; for that the Maſter inſtead of allowing the mortgage, ought to have certified the ſame to be fraudulent.

The exceptions on the 17th and 18th days of *October* 1743 (*c*), came on to be argued before Lord *Hardwicke* C. when after hearing counſel on both ſides, and the exhibits and depoſitions read, his Lordſhip over-ruled the exceptions, and allowed the claim, and directed a computation of intereſt, and an account of what was due.

(*c*) Reg. Lib. A. fol. 722.

His Lordſhip ſaid, the taking of exceptions was not the mode, and was improper; it was not a report to which exceptions lay, but ſhould have been ſet down on the report; but as the exceptions were brought on, and the parties deſired it, he would determine them.

On

On the 13th *March* 1743-4 (*a*), the matter came on to be heard for further directions on the report; and the ſame was likewiſe again ſet down on the exceptions, when the report was confirmed, and the claim allowed; and the ſequeſtrators were ordered to deliver poſſeſſion, and the plaintiff to pay *Cave* and his wife their coſts. *Hamlyn* v. *Lee.*

(*a*) Reg. Lib. A. fol. 688.

Debazin v. *Debazin.* 13 Dec. 1743.

THE plaintiff having ſued out a writ of *ne exeat regno* againſt the defendant, he entered into a bond with two ſureties, for his not departing the kingdom. The cauſe was afterwards heard, and there was a decree againſt the defendant for the ſame matter, for which the writ of *ne exeat regno* iſſued. The defendant being in contempt, and in cuſtody, for not performing the decree, the ſureties applied, and obtained an order, that they ſhould be diſcharged, and the bond as to them cancelled.

Anſty v. *Dowſing.* 17 Dec. 1743.

BILL for diſcovery, and relief, plea to both; allowed as to the relief, overruled as to the diſcovery.

Jones

16 July 1744.
3 Atk. 217. S.C.

Jones v. *Jones.*

UPON hearing the cauſe on the equity reſerved after trial of an iſſue; proper parties appearing to be wanting, liberty was given to file a ſupplemental bill for the purpoſe of adding a new party.

27 Oct. 1744.

Smithſon v. *Hardcaſtle.*

AT the execution of the commiſſion for the examination of witneſſes, one of the witneſſes demurred to being examined. The commiſſioners returned the demurrer with the commiſſion. The commiſſion and return ordered to be delivered to the two ſenior Six Clerks, not towards the cauſe, who were to copy ſo much of the interrogatories as was demurred to, and ſo as not diſcloſe any part of the depoſitions; and then to ſeal it up, and deliver it to the Six Clerk in the cauſe.

Cogan v. *Cave.*

21 Dec. 1744.

THE bill delivered amounted to 49 *l.* 0 *s.* 6 *d.* It was taxed at 45 *l.* 5 *s.* 11 *d.* In regard only 3 *l.* 14 *s.* 7 *d.* was taken off, which was not a thirteenth part; it was referred back to the Maſter to tax the ſolicitor the coſts of the taxation.

Sir

5 Feb. 1745.

Sir *Charles Dalton* and others, freeholders, owners, and proprietors of ſeveral meſſuages, lands, tenements, hereditaments, in the townſhip of *Eaſt Hawkſwell*, in the county of *York*, - - - - } Plaintiffs.

AND

Beilby Thomſon Eſq. and *Thomas Laſcelles*, and others, - - } Defendants.

(Reg. Lib. A. fol. 553.)

THE matter of the demurrer by the defendant *Beilby Thomſon* to the plaintiffs' bill, coming this day before the Lord Chancellor, the demurrer being to ſo much of the bill as ſought relief; for that it appeared of the plaintiffs' own ſhewing, that the bill was exhibited for perpetuating the teſtimony of witneſſes, and for relief; whereas by the rules of the Court, the plaintiffs were not entitled to have any relief decreed to them on a bill brought to perpetuate the teſtimony of their witneſſes; and for that it did not appear the plaintiffs had aſcertained their title at law, to the matters in queſtion. And the counſel for the defendants alſo inſiſting at the bar, for further cauſes of demurrer, that the plaintiffs had not proper parties to the bill, they not having made the lord of the manor of *Eaſt Hawkſwell*, a party thereto.

After hearing counſel on both ſides, and reading the plaintiffs' bill, his Lordſhip held the ſaid demurrer at bar, to be good, and allowed it.

29 Feb. 1745.

Stonehouſe v. *Stonehouſe.*

(Reg. Lib. B. 187.)

INJUNCTION granted to ſtay proceeding in the ſpiritual court for payment of a legacy until the hearing, and the plaintiff to ſpeed the cauſe.

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28 March 1745.

Atkinſon v. *Bedel.*

A WRIT of *ne exeat regno*, having iſſued againſt the defendant until anſwer, and further order, the defendant upon putting in his anſwer applied to diſcharge the writ. The plaintiff oppoſed it upon the ground, there were other acts to be done, which this Court muſt neceſſarily direct to be done at the hearing.

His Lordſhip denied the motion, ſaying, though the writ was granted until anſwer, yet it was likewiſe until further order, and this Court will not diſcharge ſuch writ in caſe it appears upon the merits, that there will be neceſſarily decreed things for the defendant to do at the hearing; ſuch as to deliver deeds, &c. &c. to diſcover, to convey, &c.

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15 May 1745.

Philips v. *Derbie.*

The plaintiff in a revived ſuit, may revive the original bill in the ſame manner as the original plaintiff might, had he been living.

THE plaintiff's teſtator filed his bill againſt the defendant; the defendant anſwered: the original plaintiff died whereby the ſuit abated; the preſent plaintiff revived, and obtained an order to amend,

and ſerve the defendant with a ſubpœna to anſwer the amendments. The defendant not anſwering, an attachment iſſued againſt him; on application of the defendant, it was referred to the Maſter to ſee if the iſſuing of the attachment was regular; the Maſter reported it to be irregular.

Philips v. *Derbie.*

The plaintiff took exceptions to the report; and on arguing the exceptions, it was inſiſted for the defendant, that the amendment was more properly by way of ſupplemental bill; but Lord *Hardwicke* C. held that as the amended matter was in *eſſe* at the time of filing the original bill, the ſame was proper, and the iſſuing of the attachment was regular, and allowed the exception.

18 May 1745.

Smales v. *Chayter.*

(Reg. Lib. B. fol. 281.)

A COMMISSION having been executed, it was ſealed with the depoſitions by the commiſſioners, and delivered to a perſon to be brought to the clerk in court, but by accident it was loſt on the road, and picked up by two travellers, who brought it to Mr. *Allen* one of the Maſters; upon their affidavit that they had not opened or altered the ſame, it was ordered that the depoſitions ſhould be received, and depoſited in the hands of the Six Clerk, and a rule to publiſh entered thereupon, as if the depoſitions had been regularly returned by the hand of one of the commiſſioners, or the perſon who received them from the commiſſioners.

24 May 1745.

Brown v. *Heathcote.*

THE original bill was brought by the aſſignees of the defendant *Williams* a bankrupt; the cauſe was heard, and two of the defendants not appearing, the decree pronounced was, as to them, to be unleſs cauſe. Before it was made abſolute, the then plaintiffs the aſſignees, were removed, and the preſent plaintiffs being choſen aſſignees in their room, they filed a ſupplemental bill in nature of a bill of revivor, and prayed a ſubpœna for the defendants the defaulters, to ſhew cauſe againſt the decree, without praying that they ſhould do ſo: all the defendants anſwered the new bill, and when the cauſe came on to be heard, one of the defendants who made default at the former hearing, again made default; but no ſubpœna to ſhew cauſe againſt the former decree had been ſerved, nor did the plaintiffs by the ſupplemental bill, pray that the defendants might ſhew cauſe againſt the former decree.

It was objected to the plaintiffs proceeding ſo as to pray that the former decree might be carried into execution, its not having been made abſolute.

Lord *Hardwicke* C. held the objection to be good, and did no more than to order the former cauſe to be carried on, and proſecuted; and gave liberty to the preſent plaintiffs, to ſerve the defendants the defaulters, with a ſubpœna to ſhew cauſe againſt the former decree.

On

27 July 1745.

On behalf of the Crown.

REFERENCE to a Maſter, to ſee if any of the perſons named, were guilty of the contempt laid to their charge.

Packington v. *Packington.*

3 Aug. 1745. Vid. 3 Atk. 215.

UPON ſhewing cauſe for continuing the injunction, which had been granted to ſtay the defendant, who was tenant for life, without impeachment of, or for waſte, from cutting down trees which were planted, or were ſtanding, or growing in viſtas, or for ſhelter, or ornament, &c.; the plaintiff was going to read affidavits: but Lord *Hardwicke* C. ſaid it was unneceſſary, for that the plaintiff being the eldeſt ſon of the defendant, and the firſt in remainder after his death, under the defendant's marriage ſettlement, the defendant in ſtating his own rights muſt ſhew the plaintiff's, and for that inſtead of denying the acts ſworn to have been done by him, he admitted them, and inſiſted on a right under his ſettlement; but notwithſtanding the defendant by his anſwer ſays, that although he had threatened to cut down, &c. it was not his intention, and that he did not mean to cut down any more; yet having uttered thoſe threats, and having done what he ought not, it behoved the Court to prevent his doing further waſte or ſpoil, and therefore the Court continued the injunction.

Packington v. *Packington.*

His Lordſhip in the courſe of his reaſoning, put theſe queſtions: On ſhewing cauſe to continue an injunction to ſtay waſte, is the plaintiff confined, as in an injunction to ſtay proceedings at law, to make out his caſe from the anſwer only; and may the plaintiff ſtrengthen his caſe by affidavits?

His Lordſhip ſaid the plaintiff might read the anſwer to ſhew his right, and might alſo alſo read affidavits to make out the waſte.

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5 Aug. 1745.

Hyde v. *Forſter* and *Myers.*

Service of a ſubpœna to appear, and anſwer on the agent, or factor in England, of another defendant who lived in Jamaica, ordered to be good ſervice.

THE plaintiff married a widow, who had a ſon by a former huſband, living at *Jamaica*: he comes to *England*: ſhe without the knowledge of the plaintiff her huſband, lent her ſon 1000 *l.* upon his bond to pay her an annuity of 100 *l.* for her life: ſhe alſo without the knowledge of her huſband, purchaſed chambers in *Barnard's Inn*, but took the conveyance in the name of her ſon; and he executed an aſſignment in truſt, to pay her an annuity for her life: the wife eloped, and took the writings relating to the chambers, and depoſited them in the hands of the defendant *Myers*; the plaintiff the huſband, filed a bill for a diſcovery, and relief; the ſon was at *Jamaica* at the time of filing the bill; the defendant *Myers* anſwered, and admitted he was agent, or factor in *England*, for the defendant *Forſter* the ſon, and that he was in poſſeſſion and receipt of the rents, and profits of the chambers, in truſt for the defendant *Forſter*; the

the plaintiff applied, that ſervice of a ſubpœna to appear, and anſwer on the defendant *Myers*, might be good ſervice on the defendant *Forſter*; which Lord *Hardwicke* C. ordered.

Hyde v. *Forſter* and *Myers*.

Lloyd v. *Griffith*.

7 Aug. 1745. vid. 3 Atk. 264.

AFTER hearing Counſel on both ſides, the Court directed the Maſter forthwith to make his certificate, or report of his approbation of the draft of a conveyance, which he was to ſettle, in order that the party might except thereto.

The like order made by Lord *Hardwicke* C. in *Huggins* v. *York-Buildings Co.* 26th *June* 1753.

Smith v. *Kirkpatrick*.

2 Oct. 1745.

A WITNESS in *England* not underſtanding Engliſh, a perſon was appointed to interpret the interrogatories, and the depoſitions taken thereon; and to be ſworn to the truth of ſuch interpretation.

The like order made by Lord *Hardwicke* C. in *Gaſon* v. *Wardſworth*, 26th *May* 1752. 2 Veſ. 325. 336.

21 Nov. 1745.

Hamly v. *Fiſher.*

One legacy charged on real and perſonal eſtate, if that legacy exhauſt the perſonal eſtate, the other legatees ſhall ſtand in his place againſt the deviſees of the land, *pro tanto.*

William Roberts by will, dated 13th *November* 1745, gave ſeveral ſpecific and pecuniary legacies, and having two ſiſters, gave one eſtate to one ſiſter and her children, with remainders over; and gave a leaſehold eſtate in the ſame way as far as he might, and the reſidue of his perſonal eſtate, after payment of debts, legacies, and funeral expences, he gave to his two ſiſters, equally to be divided between them, and made one of them executrix.

By a codicil of the 11th of *July* 1746, he gave an annuity of 40 *l.* out of an eſtate in *Kent*, and confirmed his will.

By another codicil dated 4th *March* 1747, which he declared to be part of his will, he gave 3000 *l.* to *Elizabeth Roberts*, beſides all other legacies given to her, which ſum he directed his executrix to pay, within ſix months after his death; and charged all his eſtates, real and perſonal, with the payment of the ſame, notwithſtanding any bequeſt either of real, or perſonal eſtates to the contrary, by his laſt will, or any codicils; ſuch bequeſts and deviſes, to be ſubject in the firſt place to the 3000 *l.*

The perſonal eſtate was much more than ſufficient to pay the legacies in the will, which amounted to 470 *l.* but the ſaid laſt mentioned legacy of 3000 *l.* exhauſting the whole, the queſtion was, whether the other pecuniary legatees, ſhould ſtand in the place of the legatee of the 3000 *l.* for their legacies, amounting to 470 *l.*; againſt the deviſees of the real eſtate.

2 *Ventris*

2 *Ventris*, 358. *Herne* v. *Merrick*, 2 *Salk.* 416. 1 *P. Wms.* 201. *Clifton* v. *Birt.* 1 *P. Wms.* 678. 3 *P. Wms.* 324. were cited. *Hamly* v. *Fiſher.*

Lord Chancellor.—All the arguments at the bar tend to confirm me in the apprehenſion I firſt had of the caſe, after the will, and codicils were read.

There are ſome things in the marſhalling of aſſets which are clear.

A legatee to ſtand in the place of a ſpecialty creditor *pro tanto*, againſt real eſtate *deſcended*;

Firſt.—If there be debts by ſpecialty, and legacies, and a real eſtate deſcends to the heir at law; if the ſpecialty creditors exhauſt the perſonal eſtate, the legatees ſhall ſtand in their place againſt the deſcended eſtate, ſo far as the perſonal eſtate ſhall be exhauſted by them.

but not againſt a *deviſed* real eſtate.

Secondly.—If a real eſtate be deviſed, the legatees ſhall not ſtand in the place of the ſpecialty creditors, againſt the deviſed eſtate; becauſe it is as much the teſtator's intent, that the deviſee ſhould have the ſpecific real eſtate, as that the perſonal legatees ſhould have their legacies, and no intent appears to prefer the one before the other: ſo if there be ſpecific, and pecuniary legacies, they ſhall not abate in proportion, and a pecuniary legatee ſhall not ſtand in the place of a creditor againſt a ſpecific legatee; alſo if a man die indebted, and having both land and perſonal eſtate, give general pecuniary legacies, and all the reſt and reſidue to another perſon, and the ſpecialty creditors exhauſt the perſonal eſtate, the legatees ſhall ſtand in their place againſt the reſiduary deviſee, becauſe the reſidue is not given as a ſpecific thing.

The caſe mentioned of a legatee's not ſtanding in the place of a bond creditor againſt a deviſee of land, is by a rule, and conſtruction of equity; but here the teſtator hath expreſsly charged the lands with

Hamly v. *Fiſher.*

with the 3000 *l.*: There being then neither want of words, nor intention to charge it in the preſent caſe, which doth not differ from that of an eſtate ſpecifically deviſed, and charged with the payment of debts, if the ſimple contract creditors exhauſt the perſonal eſtate, the legatees ſhall ſtand in their place againſt the deviſed eſtate.

This queſtion hath been conſidered as divided, namely, upon the will, and upon the codicil; but I ſhall conſider it, as if the words of the codicil had been inſerted in the will, and made but one inſtrument, in which caſe there muſt have been one uniform intent, drawn from the whole will conſidered together: and the teſtator by declaring that the codicil ſhould be taken as a part of his will, it is the ſame as if he had actually confirmed the will; and the giving of the 3000 *l.* legacies to *Elizabeth Roberts*, over and above all legacies given her by his will, is a declaration of his intent, that the legacies given by the will ſhould be paid; and amounts to a revocation of the deviſe of the land *pro tanto*: I am therefore of opinion, that the general pecuniary legatees, ſhall ſtand in reſpect of their legacies, in the place of the legatee of the 3000 *l.* againſt the deviſees of the land.

4 Aug. 1746.

Hyde v. *Greenhill.*

A SEQUESTRATION had iſſued, to ſequeſter the perſonal eſtate, and the rents and profits of the real eſtate, of the defendant. He died: the ſuit was revived againſt his reſiduary deviſee, and legatee: he applied this day to diſcharge the ſequeſtration.

Lord

Lord *Hardwicke* C. ſaid a ſequeſtration covered the perſonal eſtate, and the Court would direct a ſale for a duty; it alſo covered the rents, and profits of the real eſtate, but not the land. His lordſhip ordered the ſequeſtration as to the real eſtate to be diſcharged, but the ſequeſtration being for a duty, and the ſuit having been revived, his Lordſhip would not diſcharge the ſequeſtration as to the perſonal eſtate. *Hyde v. Greenhill.*

Sutton v. *Stone.* 27 Dec. 1745.

SEQUESTRATORS ordered to ſell a leaſehold eſtate, ſequeſtered for a duty.

On a ſimilar application, Lord *Loughborough* C. refuſed it, ſaying, who is to make out the title?

Jernegan v. *Glaſs.* 24th Jan. 1747.
(Reg. Lib. A. fol. 155.) 3 Atk. 409. S. C.

A writ of *ne exeat regno* againſt a feme covert executrix.

ORDER for a writ of *ne exeat regno*, againſt the defendant *Frances*, the wife of the defendant *Glaſs*, until anſwer, and further order, and to be marked in the ſum of 1800 *l.*

The order ſtates, it appears by the affidavit of the plaintiff, that the ſaid *Frances Glaſs*, the executrix of *Henry Jernegan*, had poſſeſſed all his goods and effects, and had withdrawn herſelf from her late habitation, and had not given any account of them, or paid the plaintiffs what was due to them, for their portions

Jernegan v. *Glaſs.*

portions or maintenance; that the defendant *John Glaſs* her huſband, had actually gone into parts beyond the ſeas, with part of the effects; and that ſhe threatened to follow ſpeedily, whereby it would be impoſſible to recover their demands; that there was due to the plaintiff *Frances Jernegan*, from the eſtate of her father 624*l.* 18*s.* and to the other plaintiff 1200*l.* as they computed the ſame; that the defendant *Frances Glaſs* died, ſometime in *September* laſt, declare that the plaintiffs, and the other creditors might make themſelves eaſy, for that the teſtator had left aſſets to pay all his debts.

Upon reading the affidavit, the order was made.

A doubt being raiſed as to the propriety of granting a writ of *ne exeat regno* againſt a feme covert; Lord *Hardwicke* cited the caſe of *Moore* v. *Meynel*, ſupr.

Hail v. *Camp.*

4th Nov. 1746. Before Mr. Baron Clarke, ſitting for Lord Hardwicke C.

Bill amended, and the plaintiff amends the defendant's copy of the bill; no occaſion to ſerve the defendant with a ſubpœna to anſwer the amendment to put the matter in iſſue.

THE plaintiff obtained the common order to amend his bill, amending the defendant's copy; the plaintiff amended his bill by adding a charge, but did not ſerve the defendant with a ſubpœna to anſwer the amendment; and goes to commiſſion, and examines witneſſes to ſupport ſuch charge.

When the cauſe came on to be heard, a direction was prayed in conſequence of ſuch new charge.

It was inſiſted on the part of the defendant, that the ſame was not in iſſue, as he had not been ſerved with a ſubpœna, and that it was a ſurpriſe upon him.

Per curiam after enquiring into the practice: The plaintiff did not ſerve the defendant with a ſubpœna; yet he amended his copy of the bill, whereby he had an opportunity of ſeeing the amendment; and he might have anſwered it had he pleaſed, and alſo have gone to commiſſion with the plaintiff; and therefore I am of opinion the amendment is in iſſue, and that the proof in ſupport of it ſhould be read. *Hail v. Camp.*

Bagſter v. *Walker.* 14 March 1746.

AN injunction revived, upon the defendant's praying a *dedimus* to anſwer an amended bill; moved upon notice, and after hearing counſel on both ſides.

Hankwitz v. *Ocarrel.* 1 May 1746.

A DECREE *niſi*: the defendant ſet down the cauſe in order to ſhew cauſe againſt it, and again made default; and the decree was made abſolute. The defendant obtained an order to re-hear the cauſe upon terms: the plaintiff applied this day to diſcharge the order; but Lord *Hardwicke* C. denied the motion, although he diſapproved the delay.

Read

11 June 1746.

Read v. *Ward.*

EXCEPTIONS being frivolous, the exceptant was ordered to pay 20 *s.* for every exception over-ruled, and 10 *s.* for every exception waived.

Bullock v. *Perkins.*

5 July 1746.

The cauſe at hearing went off for want of parties, with liberty for the plaintiff to amend. The plaintiff under the order ſtruck out many charges in the bill which the defendant had anſwered; ordered on application to be reſtored, that the Court might give the defendant the coſts of ſuch part of the bill, as the plaintiff had waived.

THE cauſe at hearing went off for want of parties; and the uſual order was made for liberty to amend the bill by adding parties, and the plaintiff to pay the coſts of the day: the defendant accepted the coſts: the plaintiff amended his bill by ſtriking out ſeveral charges, which had led the parties neceſſarily into the examination of witneſſes. The cauſe was again brought on to hearing, and the like objection was made for want of parties, and the like order as before for amending the bill. The plaintiff again amended his bill by ſtriking out ſome further charges and adding new matter, and praying relief againſt the defendants generally.

The defendants, by Mr. Attorney General and Mr. *Clark*, their Counſel, the above 5th day of *July* moved to diſcharge the amendments as irregular, or to refer it to the Maſter to ſtate whether regular, or not.

Mr. Solicitor General and Mr. *Brown*, Counſel for the plaintiffs, could not conceive there was any difference between the plaintiff's ſtriking out before, and waiving at the hearing ſuch part of the bill, as he ſhould be adviſed.

Lord

Lord Chancellor.—The difference is very obvious; *Bullock v. Perkins*
becauſe, if the plaintiff will waive any part of the bill at the hearing, the matter is then before the Court; the Court will direct the plaintiff to pay to the defendant the coſts of ſuch part of the bill as is waived; but by ſtriking out the plaintiff makes himſelf, as it were, his own judge, and by preventing that matter's coming before the Court, from which it is evident he could expect no relief, prevents the Court from doing that juſtice to the defendant which it otherwiſe would. And it would be a matter of great conſequence, and of great injuſtice to a defendant, if a plaintiff ſhould be permitted to act in this manner; for a plaintiff might bring a vexatious bill, and put the defendant to great expence in taking a copy of it, in anſwering it, and examining witneſſes; and then, after publication is paſſed, upon ſeeing the depoſitions, and finding thereby that he hath no equity, might, under pretence of amending his bill, ſtrike out ſuch part as he cannot expect relief from, and thereby prevent the Court from doing that equity to the defendant, (by ordering him his coſts), which the plaintiff hath not in himſelf.

But as to the firſt amendment, the defendant, by accepting the coſts thereof, and not complaining in time, hath eſtopped himſelf from making any complaint now.

As to the amendment under the ſecond order, and the plaintiff's new charges, and praying relief generally againſt all the defendants, it muſt be conſidered againſt the original defendant in the nature of a ſupplemental bill, and therefore improper by way of amendment, and for that reaſon I hold the laſt amendment

Bullock v. *Perkins*

ment to be irregular; and as the irregularity appears, the Court will not ſend it to a maſter to ſtate it, but will order the laſt amendment, as to ſtriking out ſome charges, and adding other charges againſt the original defendants, to be diſcharged, and the plaintiff's bill to be reſtored to what it was before; and the plaintiff to pay the coſts occaſioned thereby, and of this application.

5th July 1746.

Lee Dicher v. *Power.*

LIBERTY given to ſue out a commiſſion to examine perſons who were about to go abroad, *de bene eſſe*, and the defendant to accept four days notice of the execution of the commiſſion; after hearing counſel on both ſides.

17 July 1746.

Binſted v. *Barefoot.*

ON an application by one *Anderſon* (who was concerned as agent in *London* for a country ſolicitor), to diſcharge an order for taxing a bill of fees, and diſburſements, Lord *Hardwicke* C. declared, that agency buſineſs did not come within the act of parliament, and diſcharged the order.

20 May 1747.

Jobſon v. *Leighton.*

AFFIDAVIT referred for ſcandal.

Philips

Philips v. *Muilman.*

6 Nov. 1746. 3 Atk. 391. S. C.

AFFIDAVIT referred for impertinence.

Attorney General v. *Carte.*

19 Nov. 1746. Gilchrift v. Godfrey, 20 Jan. 1758. S. P. Corbet v. Leighton, 14 Jan. 1759. S. P.

COSTS decreed out of the eſtate, upon application, directed to be taxed, as between ſolicitor and client.

Bagſhaw v. *Batſon.*

Mich. 1746.

THE plaintiff having obtained an order to amend his bill, amending the defendant's copy, and requiring no further anſwer from the defendant, amended his bill accordingly. On hearing the cauſe, directions were prayed on the amendment.

On the part of the defendant it was objected the amendment was not in iſſue.

Lord *Hardwicke* C. ſaid, as the plaintiff had amended the defendant's copy of the bill, he might have anſwered, and put it in iſſue, and therefore gave directions on the amendment.

1746. Vid. 3 Atk. 564. Receiver ſo appointed in Parſons v. Parſons, 26 July 1744, and in Bullock v. Bullock, Eaſt. T. 1771.

Skipp v. *Harwood.*

(Reg. Lib. B. fol. 383.)

RECEIVER appointed of partnerſhip ſtock in trade, goods, effects in the brewing trade, of debts due, and to accrue; and for him to act as broad clerk in the brewing trade, and to collect in debts according to the courſe of trade; and for him to pay the exciſe and other charges; and for him to bring actions in the name of the partners, or of the late partner.

30 Nov. 1746.

Fairland v. *Enever.*

(Reg. Lib. A. 28.)

Caſh in the bank in the cauſe detained to anſwer the ſolicitor's bill of fees, and diſburſements.

AN injunction granted upon the plaintiff's paying the money ſued for into Court; the parties afterwards ſettle the matter, and apply, without the knowledge of the defendant's ſolicitor, to have the bill diſmiſſed, and the money paid out of Court. This coming to the knowledge of *Geo. Ward*, ſolicitor for the defendant, the Court, on his application, ordered part of the money to be attached to anſwer his bill of fees, and diſburſements.

Cannon

Cannon v. *Beely.* 12 Jan. 1747.

COSTS were directed to be paid out of the eſtate: the defendant in whom the eſtate was veſted refuſing to pay them, ſufficient of the eſtate was ordered to be ſold to pay the coſts, as a ſubpœna would not lie againſt the defendant for them.

Boon v. *Collingwood.* 23 July 1747.

NE exeat regno till anſwer, and further order. The defendant having put in his anſwer, he applied to diſcharge the writ, which was ordered, on his giving ſecurity to abide the event of the cauſe.

Thompſon v. *Took.* 10 July 1733.

Depoſitions allowed to be read, though taken during an abatement.

APPLICATION to ſuppreſs depoſitions, for that they were taken during an abatement, upon reference to one of the Maſters to enquire into the regularity.

He, by his report, dated the 13th *June* 1733, certified, that it had always been deemed irregular to execute a commiſſion during an abatement, but as ſuch practice muſt be fatal in ſome caſes, and expenſive in all, he hoped it did not ſo far prevail as to be the eſtabliſhed rule of the Court, and therefore, as it appeared to him, the commiſſion was regularly executed; and that the conſcience of the Court might be as fully informed

Thompſon v. *Took.* from the depoſitions of the witneſſes taken under ſuch commiſſion, as if there had been no abatement; that he could not ſee any thing irregular in the execution thereof, or that the defendants had any reaſon to complain they were injured thereby, but that, on the contrary, the plaintiff would be greatly injured was he to loſe the benefit of the witneſſes examined under the commiſſion upon a matter of form; and therefore, and for the reaſons mentioned in a caſe *Crew* againſt *Vernon*, determined by the Lord Keeper, aſſiſted by four Judges, and reported in Cro. Car. fol. 97, he conceived there was no irregularity in the execution of the ſaid commiſſion.

Upon which report, after hearing counſel on both ſides, Lord *Talbot* C. allowed the depoſitions to ſtand.

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12 Feb. 1747. *Peters* v. *Robinſon.*

ON a ſimilar application, Lord *Hardwicke* C. declared he thought it was greatly for the convenience of the ſuitor; and as an authority was produced to him, he thought he was tied down thereby, and therefore allowed the depoſitions to be made uſe of.

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20 Oct. 1747. *Powel* v. *Follet.*

LORD *Hardwicke* C. held that if a party, or his attorney, having knowledge of an injunction's being granted, proceed at law, he is guilty of a contempt, though the injunction be not ſealed.

John

John Swinifen, executor of *Mary* the widow, and executrix of *Lewis Scawen*, and alſo adminiſtrator *de bonis non* of the ſaid *Lewis Scawen*, with his will annexed, - - - - } Plaintiff.

Dame *Mary Scawen*, the widow and executrix of Sir *Thomas Scawen*, and her two younger ſons, the reſiduary legatees, - - } Defendants.

23 Feb. 1747, reheard 18 June 1748. 1 Veſ. 99. S. C.

(Reg. Lib. B. fol. 129.)

SIR *Thomas Scawen* by his will, dated in *July* 1730, gave 200 *l.* to the ſaid *Lewis Scawen* for mourning, and the reſidue of his perſonal eſtate to the defendants his younger ſons, and appointed the defendant Dame *Mary* his wife executrix. In *September* 1730 the teſtator died, and his widow proved the will. His perſonal eſtate was very ample, conſiſting principally of mortgages, and other ſecurities.

Intereſt at 5 per cent. decreed on a legacy for mourning under ſpecial circumſtances.

The legacy not having been paid, the plaintiff in the aforeſaid right filed his bill for payment (amongſt other things) of the ſaid legacy, with intereſt at 5 *per cent.*, ſtating that the teſtator's perſonal eſtate was greatly more than ſufficient to pay his debts, and legacies, and that it conſiſted of mortgages, and judgments, carrying intereſt at 5 *per cent.*

The defendant Dame *Mary Scawen* admitted the will, and the death of the teſtator at the time ſtated; that ſhe proved the will; and that the teſtator died poſſeſſed of perſonal eſtate more than ſufficient to pay

Swinſen v. *Strawen* et al.

his debts and legacies; but that ſhe being aged, and infirm, her two ſons, the other defendants and the reſiduary legatees, had principally acted in the teſtator's affairs; that all the debts and legacies had been paid except the plaintiff's demand; and ſaid, that the perſonal eſtate was out upon ſecurities; amongſt others, 12000 *l.* upon one judgment, carrying intereſt at 5 *per cent.*; and another part upon a mortgage for a large ſum, carrying intereſt likewiſe at 5 *per cent.*: that not being able readily to get in the mortgage money, ſhe, with the conſent of the reſiduary legatees, had, out of the perſonal eſtate, purchaſed the equity of redemption, but that it had been agreed that ſuch purchaſe ſhould be conſidered as perſonal eſtate; and ſaid further, that when ſhe could get in aſſets, ſhe was willing and deſirous to pay the plaintiff's ſaid legacy.

Upon this caſe, Lord *Hardwicke* C. decreed payment of the legacy, with intereſt at 5 *per cent.*

And indeed I do not ſee how the Court could do otherwiſe; for all the debts and legacies being paid except the plaintiff's, and the funds to pay it being out at intereſt carrying 5 *per cent.*, the teſiduary legatees, were they to pay only 4 *per cent.* would be putting 1 *per cent.* out of the plaintiff's legacy into their pocket ſo long as they neglected to pay; and it being ſaid at the bar, that it was uſual for the Court, at the time the cauſe was heard, to give 5 *l. per cent.* intereſt on legacies; I ſearched the Minute Books for ſeveral years before, and ſince that period in Lord *Hardwicke*'s time, and did not find any other decree for an account of legacies, that departed from the uniform language; for the Maſter to compute intereſt on the legacies from the end of one year after the teſtator's death, after the rate of 4 *per cent. per annum*, unleſs any other time of payment, or rate of intereſt is fixed by the will, and in that caſe, according to the will. J. D.

Mackintoſh

Mackintoſh v. *Ogilvie.*

10 March 1747.

The defendant, a creditor of the bankrupt, having arreſted and received part of bankrupt's effects in Scotland, a writ of *ne exeat regno* granted againſt him.

THE plaintiffs were the aſſignees of *J. Aberdeen*, a bankrupt, who had effects in *Scotland*: the defendant was a merchant in *London*, and a creditor of the bankrupt for 31 *l.* He arreſted the bankrupt's effects in *Scotland* in the hands of the bankrupt's debtors, and obtained a decreet or ſentence according to the laws of that country for payment of the money, and received part; and being about to go abroad, the plaintiff, on the 24th of *February* 1747, obtained an order for a *ne exeat regno*, till anſwer, and further order. The defendant on the above day applied to diſcharge the writ.

Lord *Hardwicke* C.—Commiſſions of bankruptcy equaliſe all creditors in *England*; and as the defendant is reſident in this country, he is ſubject to the laws thereof, and therefore I will not permit any perſon to paſs into *Holland*, or *Scotland*, where arreſtments are allowed, to gain a total ſatisfaction of their debt, in prejudice of the other creditors. For if he goes out of *England*, and out of the reach of the proceſs of this Court, his agents may recover the debt, and he can never be accountable here; therefore let the writ continue.

7 March 1747.

Shelly v. *Pelham.*

(Reg. Lib. B. fol. 194.)

ORDER on petition of a receiver, anſwered without an attendance, that he might diſtrain in the names of the truſtees, not only for the arrears of rent, but as there ſhould be occaſion. But query (*a*).

(*a*) In Raincock v. Simpſon, 12 March 1764, Lord Northington C. held that if the tenant had attorned to the receiver, he might diſtrain without an order. J. D.

9th April 1747.
3 Atk. 480.
S. C.

Knight v. Earl of *Plymouth*, et é contra.

(Reg. Lib. A. fol. 341.)

THIS matter came before the Court upon the petition of *Thomas Lewellin*, the receiver appointed in the firſt cauſe of the eſtates of *Thomas Lewis*, the teſtator, in the pleadings named, praying to be allowed a loſs that had happened in remitting the rents received by him to town, through an unforeſeen event: the petition ſtated, that the ſaid *Thomas Lewis* died ſeiſed of eſtates in *Wales* of very large extent and great yearly value, on part of which he had created terms, and veſted the ſame in truſtees, for payment of 300 *l.* a year to his wife for life, as a jointure; and other part thereof he had deviſed, ſubject to debts, and legacies; that he was greatly indebted, and particularly to the father of the preſent Earl of *Plymouth*, by mortgage in 25,000 *l.*

That the plaintiffs in the firſt cauſe, had filed their bill to be paid their debts, and legacies, and that upon hearing the ſaid cauſe, a decree was pronounced, directing the neceſſary accounts, and ordering payment; that the

the petitioner had been appointed the receiver, under an order for that purpoſe. *Knight* v. Earl of *Plymouth*, et é contra.

That the plaintiffs in the ſecond cauſe, had filed their bill, to have the ſaid 25,000 *l.* raiſed and paid; which had been decreed, and a receiver was directed to be appointed, of the ſaid late earl's perſonal eſtate.

That by an order in the firſt cauſe, the petitioner was directed to apply the rents of the premiſes in mortgage, in keeping down the intereſt of the mortgages; that the petitioner kept the rents diſtinct, and paid the balances as he was ordered.

That in *February* 1740, he ſet out from *Cardiff* for *London*, to paſs his accounts from *Michaelmas* 1738 to *Michaelmas* 1739, and in order to pay ſuch balances as ſhould be found due from him; he ſent before him to *Briſtol* 826 *l.* in order to procure bills to return to *London*, and carried himſelf to *Briſtol* 350 *l.* for the ſame purpoſe; that when he came to *Briſtol*, which was later than he deſigned, he found the perſon by whom he had ſent the 826 *l.* had carried it back to *Cardiff*; that the petitioner as ſoon as he arrived at *Briſtol*, applied to *William Winſmore*, who had before returned large ſums to town, for and on account of the eſtate, whoſe bills had always been paid, and who was at that time in high credit, as the petitioner apprehended, for bills payable in *London* for 350 *l.* and thereupon *Winſmore* gave him a bill, dated the 4th of *February* 1740, on one *Thomas Harris* in *London*, for 350 *l.* payable to the petitioner or order, twenty-one days after date; the petitioner alſo mentioned to him the accident of the 826 *l.* being carried back to *Cardiff*, and deſired him to give a bill for it when returned; and on the ſaid 826 *l.*

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being brought back and paid into the hands of the ſaid *Winſmore*, in order to be returned to *London*, he gave to the petitioner's clerk, two bills on the ſaid *Harris*, both dated the 7th *February* 1740, one for 426 *l.* the other for 400 *l.* payable to the petitioner or order, one month after date; the three bills were accepted, but before they were payable, *Harris* diſappeared, and the petitioner proteſted the bills, and on the 3d of *March*, *Winſmore* became a bankrupt, and his eſtate and effects were aſſigned to his aſſignees.

The petitioner paſſed his accounts to *Michaelmas* 1739, and the balance found due from him was 910 *l.*

The petition then ſtates, that the petitioner had received from *Winſmore's* eſtate, a dividend of 2 *s.* 9 *d.* in the pound, upon the ſaid 1176 *l.* and that the proportion thereof in reſpect of the ſaid balance of 910 *l.* amounted to 124 *l.* 4 *s.* 10 *d.* ſo that there was ſtill due to him on account of the ſaid balance 785 *l.* 7 *s.* 6½ *d.*

That the petitioner having paſſed his accounts up to *Michaelmas* 1743, of the reſpective eſtates, and balances being found due from him to the Earl of *Plymouth*, the executors and truſtees in the will of the teſtator, and the teſtator's widow, applied by petition, that the ſaid Mr. *Lewellin* the receiver, might pay the ſaid reſpective balances; that by an order thereon, it was referred to the Maſter to enquire as to the fact of the ſaid 1176 *l.* being remitted to *London*, by the petitioner; and upon what occaſion the remittances were made, and in what manner, and at what times, and when *Winſmore* became a bankrupt, and how much of the ſaid 1176 *l.* had been received,

received, and was likely to be received, out of *Winſmore's* eſtate; that on the 3d of *Auguſt* 1747, the Maſter reported, that he found the money had been remitted to *London*, at the times, and in the manner, and for the purpoſes before ſtated; that there had been a dividend of 2 *s.* 9 *d.* in the pound, and that it was thought there would be a further dividend of 4 *s.* 9 *d.*

And therefore the petitioner, *Thomas Lewellin* the receiver, by his ſaid petition prayed, that he might be allowed out of the balances found due from him, what he had loſt by *Winſmore's* bankruptcy (*a*).

On the 14th *April* 1747, the petition came on to be heard.

(*a*) Thus far the caſe is ſtated from the book of entries. J. D.

On the part of the petitioner, it was argued, he was an officer of the court, and acted under the directions of it; that he had always paid his balances, according to orders for that purpoſe; that the perſons to whom he was ordered to pay his balances, being in *London*, the means he took to get ſo large a ſum to town, was the only one he could with any degree of prudence think of; that there was no *mala fides*; that there had been no neglect, nothing wilful, in ſhort, nothing had been, nor could be imputed to his conduct in the diſcharge of his duty; that as the loſs had happened by his being ordered to pay his balances to perſons who lived at ſuch a diſtance, it was unreaſonable he ſhould be ſubject to the loſs; it was unconſcientious to attempt it.

On the part of the truſtees, executors, and the infant, it was argued, that true as it was that Mr. *Lewellin* was an officer of the court, yet that this was an office not impoſed, but ſought by him with a view to

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to gain; that the order under which he was appointed, directed an allowance to be made him for his care and pains; and that by his recognizance he was bound to account for and to pay what he ſhould receive, as the Court ſhould direct; that the Court had directed the manner, and to whom he was to make his payments; that it was by him the parties expected to be paid, and that it was no concern to them, by what means or in what manner he got his money to *London*; if it were attended with difficulty or trouble, he was paid for it; if with hazard, he could not but be ſenſible of it, before he accepted the appointment; that though they might feel for his loſs, they were not to be affected by it; that they were truſtees, and concerned for creditors and an infant, and whatever might be their feelings, and however they might be diſpoſed, was it their own immediate concern, they could not without violating their truſt, avoid inſiſting on his paying the balance found due from him.

Lord Chancellor.—The matter before the Court ariſes upon a loſs occaſioned by an unforeſeen event, and the queſtion is, by whom it is to be ſuſtained: to determine which, it will be neceſſary to take a view of the hiſtory of the caſe, and the circumſtances attending it.

Mr. *Lewis* the teſtator, was ſeiſed of very large and extenſive eſtates in *Wales*, for the management of which, and to receive the rents, he employed agents; being greatly in debt, by his will he created ſeveral truſts, and appointed truſtees to ſee thoſe truſts executed; as it was an office that would of neceſſity be attended with great trouble, it cannot be imagined he meant they ſhould do more than he did himſelf, that

that is, ſuperintend and examine the accounts of thoſe they ſhould employ to receive the rents, &c. and ſee to the application of the rents, according to the reſpective truſts. They accordingly did employ agents; and when they received the rents from them, they remitted the balances to town as Mr. *Lewellin* had, by bills drawn on perſons in town, and ſome through the hands of Mr. *Winſmore*; to relieve themſelves from that trouble and charge, the truſtees upon filing the bill in that cauſe, applied for, or at leaſt aſſented to an application, to appoint a receiver of the ſaid eſtates, which was ordered; and in conſequence of it, Mr. *Lewellin* was appointed the receiver, againſt whoſe conduct there hath not been the leaſt imputation; on the contrary, it appears he hath diſcharged his duty with great punctuality, having regularly every year paſſed his accounts, and as conſtantly paid his balances. Having collected his money together to a large amount, 1176*l.* he ſet out for *London*, in order to paſs his accounts, and that he might pay the balance when his accounts ſhould be paſſed, he paid the money into the hands of a perſon, by whom he had before remitted money, as the truſtees themſelves had before done; and took bills payable to himſelf or order at a future day in *London*; Mr. *Winſmore* the drawer of the bills, was at that time in high credit, and there was not then the leaſt ſuſpicion of his circumſtances, and had it not have been for the unforeſeen event of the bankruptcy of Mr. *Winſmore*, Mr. *Lewellin* would have paid the balance due from him, as he had before conſtantly done; the method Mr. *Lewellin* took was highly prudent; it was well intended, and the only way he could take, unleſs he had

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6 May 1747. Anon. 3 Atk. 485 S.C. Vid. Counteſs of Strathmore v. Bowes, inf.

Attorney General v. *Burrows.*

THE defendant's denying he had committed waſte ſince the filing of the bill, Lord *Hardwicke* C. ſaid was not an inducement to refuſe an injunction; for as he admitted he had done waſte, he might do further waſte.

Suppoſe it had been the firſt time a doubt had ariſen reſpecting the admiſſion of proof in ſupport of an injunction to ſtay waſte, it is ſubmitted whether the defendant, by taking notice of the affidavits upon which the injunction was founded, and ſaying they were almoſt wholly untrue, doth not call upon the Court to enquire what thoſe affidavits are. The Court is concerned; for if untrue the Court was impoſed upon, and miſled to grant the injunction: if true, the ſame reaſon will hold for continuing, as there was for granting the injunction; and further, the defendant, by ſaying that part of the affidavits was untrue, is in effect admitting the other parts to be true; and that part may be ſuch as to warrant the injunction. J. D.

21 May 1747.

Bromly v. *Child.*

THE plaintiff exhibited interrogatories before the Maſter purſuant to the decree, and examined the defendant. He afterwards applied for, and obtained an order, as of courſe, to exhibit new interrogatories. Motion on this day to diſcharge the order. Lord *Hardwicke* C. ſaid, this Court will not let parties exhibit interrogatories as of courſe, for it will occaſion the lengthening of ſuits, and vexation, as for inſtance, amending bills. But on ſpecial application it may be done.

Williamſon

Williamſon v. *Henſhaw.* 26 June 1747.

(Reg. Lib. B. 396.)

AN order to confirm a report abſolute in 1767. It appeared by the Minute Book to have been drawn up, but not entered. And the order being loſt, liberty was given to redraw up the order, and to enter it *nunc pro tunc*, though to charge intereſt.

Earl of *Derby* v. Duke of *Athol.* 8 Feb. 1748. 2 Veſ. 357. S. C.

THE bill was to determine the right of the *Iſle of Man.* Plea, amongſt other things, to the juriſdiction of the Court; but the defendants by their plea, not pointing out where the matter was proper to be determined, Lord *Hardwicke* C. diſallowed the plea; declaring, that in pleas of this nature it was incumbent on the defendant to ſhew what Court had the juriſdiction whereby he would bind himſelf: otherwiſe a defendant might object the ſame in every Court, and thus the plaintiff might be deprived of the relief to which he was entitled.

Lloyd v. *Nangle.* 2 Nov. 1747.

IF a ſolicitor groſsly neglects his client's concerns, this Court will exerciſe its juriſdiction in a ſummary way by attachment, as at law.

16 Nov. 1747.

Bennet v. *Walker*.

The anſwer of one defendant read as evidence to ſupport the plea of another defendant.

ON arguing a plea, a queſtion aroſe, whether the defendant could read the anſwer of another defendant, to which by the anſwer put in by him he referred, in ſupport of his plea. The plea was, of his being a purchaſer with notice; and by his anſwer he ſaid he purchaſed of the other defendant, and believed ſuch other defendant had notice before he purchaſed, but refers to the anſwer of ſuch other defendant, which did not admit notice, or ſufficiently deny it. Lord *Hardwicke* C. permitted the anſwer of ſuch other defendant to be read.

Barneſly v. *Powel*.

15 Dec. 1747.

Goods ſequeſtered being inſufficient to anſwer a duty decreed, the Serjeant at Arms revived.

THE Serjeant at Arms had gone after the defendant, and on his return a ſequeſtration iſſued for not performing the decree. The defendant being a barriſter, and conſtantly going the circuits, and the effects ſequeſtered being inſufficient to ſatisfy the decree, the Serjeant at Arms was revived. This was oppoſed as a double execution, but after ſolemn argument allowed: the commitment being to anſwer the contempt, the ſequeſtration *ad ſatisfaciendum*.

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3 Feb. 1747-8.
1 Vef. 83. S. C.

Hill v. *Allen*.

If a maſter encourages his apprentice to go to ſea, and he takes a prize, equity will not aſſiſt him to receive his apprentice's ſhare of the prize money.

BILL by the maſter of an apprentice to be paid his apprentice's ſhare of ſome prize money, the apprentice having eloped.

Lord

Hill v. *Allen.*

Lord Chancellor.—In general the maſter is entitled to the earnings of apprentices; but yet if the maſter encourages him to go to ſea, and to put himſelf in a different way, I ſhould very much incline to relieve againſt that rule of law, in an action brought by the maſter, becauſe it tends to encourage maſters to ſeduce their apprentices to leave them; but in the preſent caſe, (as the evidence is), the maſter has been ſo far from ſeducing the apprentice to go aboard a privateer, (in which he took a prize), that he diſſuaded him from it. His Lordſhip recommended it to the parties to agree, or otherwiſe ſaid, he would let the parties go to law in an action, as he did in *Meriton* againſt *Hornby*.

Kemp v. *Squire.*

10 Feb. 1748.
1 Veſ. 205. S. C.

THE bill was brought in the name of the plaintiff an infant, to be relieved againſt a fraudulent aſſignment of his ſhare of prize money; the plaintiff's ſolicitor ſerved the defendant with a ſubpœna to hear judgment, but neglected to inſtruct counſel to appear for the plaintiff at the hearing, (becauſe, as he alledged, he could not get any thing towards his bill of coſts), in conſequence of which the bill was diſmiſſed. Three months after, no caveat having been entered, the decree was inrolled, and ſet up by the defendant, in bar of the plaintiff's right: the plaintiff having attained the age of twenty-one, he applied to have the inrolment diſcharged, which Lord *Hardwicke* C. granted, upon the plaintiff's paying the defendant the coſts occaſioned by his not appearing,

The ſolicitor of the plaintiff an infant, having ſuffered the bill to be diſmiſſed for want of appearing at the hearing, and the order of diſmiſſion to be inrolled; the inrolment was ſet aſide after the plaintiff had attained twenty-one, and he was at liberty to rehear the cauſe.

Kemp v. *Squire.* and the plaintiff was to be at liberty to rehear the cauſe.

His Lordſhip cited *Robſon* v. *Cranwell*, 18th *December* 1731. S. P.

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9 Feb. 1748.

Hyde v. *Forſter.*

Sequeſtration againſt a defendant on meſne proceſs abates on the death of the plaintiff, but is revived with the ſuit.

THE defendant was in contempt to a ſequeſtration, for want of his anſwer: the ſuit abated by the death of the plaintiff: his repreſentatives revived, and obtained an order, for the clerk in court to attend with the record of the bill, in order that the ſame might be taken *pro confeſſo*. The queſtion was, whether there was not an end of the contempt, as it was upon meſne proceſs. After hearing counſel on both ſides, Lord *Hardwicke* C. declared, that as the ſuit and proceedings were revived, the plaintiff was regular; but the defendant alledging his anſwer was filed the morning the order was obtained, his Lordſhip, upon the defendant's paying the coſts of his contempt, accepted his anſwer, and diſcharged the order.

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28 Feb. 1748.
3 Ves. 275. S. C.

Ithel v. *Bean.*

THE teſtator charged by his will his freehold eſtates with the payment of his debts: he had no freehold eſtates, but had copyhold, which he had not ſurrendered to the uſe of his will. Lord *Hardwicke* C. directed the defect of the ſurrender, to be ſupplied for the benefit of creditors.

Ex

Ex parte *Roſs*.

28 April 1748. Vid. Spettigue v. Carpenter. Supr. 66.

APPLICATION to remedy a miſtake in making a bond of ſubmiſſion, an order of Court, after the award under it was made.

Samſon v. *Overton*.

18 May 1748.

(Reg. Lib. B. fol. 152.)

THE defendant the wife had appeared; ſhe afterwards abſconded: proceſs againſt the huſband and wife, but to be ſtayed againſt the huſband, and liberty given to ſue out a commiſſion of ſequeſtration againſt the wife.

Gould v. *Barnes*.

20 May 1748.

BILL for a diſcovery: the defendant anſwered; the ſuit afterwards abated; held by Lord *Hardwicke* C. it was not to be revived.

Dupont v. *Ward*.

27 Jan. 1748.

The defendant is in cuſtody for his contempt, in not putting a better anſwer: having put in an anſwer he applied to be diſcharged, which was ordered; no exception having been taken to the ſecond anſwer.

THE defendant was in cuſtody for his contempt in not putting in a better anſwer, his former anſwer having been reported inſufficient; while in cuſtody he put in another anſwer, and applied this day to be diſcharged, on paying the coſts of his contempt. It was oppoſed by the plaintiff, who alledged, it was upwards of twelve months before the defendant,

Dupont v. Ward.

who was the well known *John Ward* of *Hackney*, could be taken on the attachment which had iſſued againſt him for want of his anſwer; that the anſwer put in was before counſel; that he was perſuaded it was inſufficient, and that he meant to take exceptions; that the bill was for a diſcovery, and were the defendant to be diſcharged, the plaintiff would not be able to get an anſwer.

Lord *Hardwicke* C. ſaid, as to what or who the defendant is, this Court hath nothing to do with it; here juſtice is to be diſtributed without favour, or affection: the defendant being in contempt for want of his anſwer, an attachment hath iſſued; he hath been taken upon it, and is in cuſtody; he hath ſince put in an anſwer and applies to be diſcharged, upon payment of the coſts of his contempt. The anſwer until found otherwiſe, muſt be taken to be ſufficient; no exception hath been taken, and to detain him until exceptions ſhall be taken, and it ſhall be ſeen whether the anſwer is ſufficient, is contrary to every principle of juſtice. Suppoſe I ſhould refuſe the motion, and the plaintiff ſhould take exceptions, and the anſwer ſhould be found ſufficient, what recompence could be made to him: therefore let him be diſcharged out of cuſtody, upon payment of the coſts of the contempt to be taxed, and let the plaintiff deliver a bill in two days.

Attorney

Attorney General v. *Smith*. 10 Nov. 1748.

THE defendant being in contempt for want of his appearance, and a priſoner in *York* Caſtle, Mr. *Wilbraham* on behalf of the plaintiff, to ſave the trouble and expence of bringing him up by *habeas corpus*, moved to take the bill of revivor *pro confeſſo* againſt him. Lord *Hardwicke* C. ſaid, the plaintiff muſt purſue the ſtatute of the 5 *Geo.* 2. to render proceſs effectual, &c. although it were once doubted, whether it extended to bills of revivor; but it was now ſettled, that it did.

Vanhathen v. *Shuman*. 14 Nov. 1728.

APPLICATION for an agent, the attorney of an executor, (who lived abroad, and was in contempt to ſequeſtration for want of an appearance), to pay 500 *l.* out of money received for the uſe of the executor, held by the Lord Chancellor, and the Maſter of the Rolls, to be improper in that ſtage of the cauſe.

Bennet and others v. *Button* and others. 13 Dec. 1748.

THE defendant being in contempt to a ſequeſtration for want of his anſwer, founded on a commiſſion of rebellion, and return of the Serjeant at Arms, the titles of the commiſſion of rebellion were miſtaken; the miſtake ordered to be rectified.

Sequeſtration made out following the title of the order, for

Bennet et al. v. *Button* et al.

Arms, *non eſt inventus*, he put in his anſwer, after which, a miſtake is diſcovered, that the commiſſion of rebellion is indorſed at the ſuit of *Bennet* plaintiff only, and ſo entered, and the order for the Serjeant at Arms is likewiſe ſo entitled, and entered; but the attachment, and the attachment with proclamation, are endorſed at the ſuit of *Bennet* and others plaintiffs. Upon application to rectify the miſtake, Lord *Hardwicke* C. ſaid, the defendant had acquieſced by putting in his anſwer, and the firſt proceſs being made out right, he would order it, which he accordingly did.

3 Dec. 1745.

Paradice v. *Sheppard.*

(Reg. Lib. B. fol. 20.)

THE plaintiff brought her bill, as adminiſtratrix of *Suſanna Harding*, and obtained an order to ſue *in formâ pauperis*: the defendant applied the above day to diſcharge the order. Lord *Hardwicke* C. ſaid, the indulgence intended poor perſons not of ability to ſue for their rights *in formâ pauperis*, extends only to perſons ſuing in their own rights, and not as executor, or adminiſtrator, and therefore diſcharged the order.

Wharam

Wharam v. *Broughton.*

17 Dec. 1748.
1 Ves. 180. S. C.

THE defendant was in contempt to a ſequeſtration, for not performing a decree; the ſuit had abated by the death of the plaintiff, but had not been revived. Lord *Hardwicke* C. declared, as in the caſe of *Hyde* v. *Forſter* (*a*), that as the ſuit had not been revived, the ſequeſtration had dropt; but otherwiſe, if the ſuit had been revived.

(*a*) Supra. 102.

Ex parte *Saunders.*

13 July 1749.

ON the 13th day of *July* 1749, his Lordſhip was moved, that an order in this matter of the 16th *March* preceding, for a writ of *homine replegiando*, for replevying *Suſanna Barron*, by the name of *Suſanna* the wife of *Thomas Saunders*, and ſaid to be detained by *Matthew Forteſcue*, might be diſcharged; and that the writ *de homine replegiando, alias*, and *pluries*, iſſued purſuant to the ſaid order, might be ſuperſeded.

Mr. *Clark*, afterwards Maſter of the Rolls, moved, and was oppoſed by Mr. *Floyer* and Mr. *Wilbraham*, counſel for the ſaid *Thomas Saunders*; upon which it was by conſent ordered, that the defendant ſhould put in bail, in the court of King's Bench, to the writ *de Withernam*, already taken out by the plaintiff, within the firſt week of the next term, the defendant in 500 *l.* according to the courſe of that court; and after the bail ſhall be given, the plaintiff is forthwith to deliver a declaration, and the defendant is to plead *non*

The courſe of proceeding on a writ *de homine replegiando*, and writ *de Withernam*.
The proceſs is—Firſt, a *capias in Withernam*, if *nihil* returned, then an *alias capias*—*pluries capias*—*exigent*—*outlawry*. If the defendant appears, he muſt find ſecurity or ſtandcommitted; if he gives ſecurity, then the plaintiff muſt declare, and proceed to trial.

Ex parte *Saunders.*

non cepit, and traverſe the marriage, and in the mean time, the plaintiff is to ſtay proceedings on the *capias in Withernam.*

4 1749. An application this day was made by Mr. Attorney General and Mr. *Clark*, to diſcharge the order of the above 13th *July*, and 16th of *March*, which was refuſed; but the Court by conſent, enlarged the time for the defendant's giving bail.

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3 Feb. 1749.
2 Atk. 120.
S. C.

French v. *Baron.*

(Reg. Lib. A. fol. 340.)

BILL againſt the deviſees in the truſt, and the heir at law, to eſtabliſh the will of the teſtator, and to have the truſts executed by ſale of the eſtate: the bill ſuggeſted the heir at law could not be found, which was admitted by the defendants: the will was proved *per teſtes.* Lord *Hardwicke* C. ſaid he could not declare the will proved, their being no heir at law before the Court, but he directed the real eſtate to be ſold.

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8 Feb. 1749.
1 Veſ. 383.
S. C.

Travers v. Bulkley.

A FEME covert having obtained an order to anſwer ſeparately, will be held to it; and ſo ruled by Lord *Hardwicke* C. and the Maſter of the Rolls.

Edwards

Edwards v. *Denniſon.*

19 Feb. 1749.

The claim of the Univerſity of Oxford, of a ſuit in this Court, allowed.

AN application by the Univerſity of *Oxford*, to have the cognizance of a ſuit commenced in this Court, under ſeveral grants from the Crown. It came before the Court on the 18th of *December*, and on the above day, Lord *Hardwicke* C. ordered the claim of cognizance to be allowed, and the plaintiff's bill to be diſmiſſed with coſts, and that the claim ſhould be filed with the Six Clerk for the defendant, and be recited *verbatim* in the order; and directed the order to be in the words of an order in *Aldridge* v. *Stratford*, 5th *March* 1712. His Lordſhip was attended with a draft of an order before it was delivered.

Lloyd v. *Baldwyn.*

19 March 1749. Sir John Strange M. R. ſitting for Lord Hardwicke C.

BY the decree it was referred to the Maſter to take an account of the teſtator's debts, and to compute intereſt on ſuch of the debts as carry intereſt, after the rate they reſpectively carried intereſt; and likewiſe an account of the teſtator's perſonal eſtate, which was to be applied in a courſe of adminiſtration. The Maſter made his report, that he had taken the accounts directed by the decree, and ſtated the amount of the debts, by ſpecialty and ſimple contract.

Upon the cauſe coming on to be heard for further directions, it was referred back to the Maſter to compute ſubſequent intereſt on the debts, from the foot of his report.

The

Lloyd v. Baldwyn

The Maſter proceeded to compute ſubſequent intereſt on the debts on which he had before computed intereſt from the foot of his report; but he refuſed to compute intereſt on the *liquidated* ſimple contract debts, although it was inſiſted by the ſimple contract creditors, that their debts being liquidated by the former report, their debts became judgments from the *time of the confirmation* of the ſaid former report, and carried intereſt; and upon that ground the plaintiff and the other ſimple contract creditors took exception to the report. Theſe exceptions were on this day argued, and over-ruled (*a*).

(*a*) This was acquieſced in. J. D.

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24 Feb. 1749—50. 1 Veſ. 395. S. C.

Suſanna Elizabeth Vanheſſen, wife of *Caſimir Abraham* Count of *Shippenbeck*, and the South Sea Company, - - - - - - } Plaintiff.

Count of *Shippenbeck* and the South Sea Company, - - - } Defendants.

(Reg. Lib. B. fol. 237.)

THE plaintiff in 1742 was a widow, and poſſeſſed of 3500 *l.* South Sea annuities. She and her preſent huſband before their marriage, agreed by writing under their hands, that there ſhould not be the leaſt community of goods, effects, or eſtate, but that each ſhould poſſeſs and enjoy what they poſſeſſed without the interference, or control of the other; and the defendant the Count by the ſame inſtrument diſclaimed any right in, or to the property of his ſaid then intended wife. Differences afterwards ariſing between them

them, they agreed to live ſeparate; and the agreement was confirmed agreeably to the courſe in *Holland*.

The plaintiff finding a difficulty in recovering, and getting in her property, preferred a petition to the proper Court in *Holland*; and the Court, on the 10th of *December* 1744, decreed the plaintiff ſolely, and without the aſſiſtance of her huſband, to receive and diſpoſe of her effects, and to do all acts neceſſary for the purpoſe.

The South Sea Company refuſing to permit the wife to transfer the ſaid 3500 *l.* South Sea annuities, her huſband refuſing to join with her, the plaintiff filed her bill againſt the defendants, to permit her to diſpoſe of the ſaid annuities. The huſband living in *Holland*, and out of the juriſdiction of the Court, he was, by advice, ſerved with a ſubpœna to appear, and anſwer, which he not doing, the uſual line of proceſs iſſued againſt him, the laſt of which was a ſequeſtration; but being out of the juriſdiction of the Court, and not having been within the kingdom within two years preceding the bill, he did not come within the ſtatute of the 5 *Geo.* 2., to render proceſs effectual againſt perſons abſconding, &c.

In this ſtate the cauſe came on to be heard, when Lord *Hardwicke* C., after prefacing that the defendant the huſband had been ſerved with a ſubpœna to appear to anſwer the bill; and that a ſequeſtration had iſſued againſt him for want of his anſwer, ordered the South Sea Company to permit the plaintiff to transfer the ſaid South Sea annuities.

Bowles

25 July 1749.

Bowles v. *Parſons.*

(Reg. Lib. A. fol. 529.)

Finch, in purſuance of the decree was appointed receiver of the eſtates of the defendant *Parſons*. He applied to *Thomas Harris*, one of the tenants, to attorn, but he had before attorned to *Samuel Gray*, who claims to have a mortgage on the eſtate prior to the plaintiff's demands.

By an order, dated the 19th of *December* 1748, *Gray* was to come in, and be examined *pro intereſſe ſuo*, and the plaintiff was to exhibit interrogatories for that purpoſe, and the rents in the tenants' hands were to be paid to the receiver without prejudice. Interrogatories were ſettled by the Maſter, and *Gray* put in his examination.

(a) Reg. Lib. A. fol. 241.

By an order, dated 15th of *March* 1748 (*a*), it was referred to the Maſter to examine, and certify if *Gray* had made out any, and what intereſt in the premiſes.

The Maſter by his report, dated the 28th *March* 1749, found *Gray* had a prior right.

The cauſe was ſet down to be heard for further directions on the report, and came on to be heard before Lord *Hardwicke* C., on the 20th of *July* 1749, when his Lordſhip ordered the receiver to be diſcharged as to the premiſes compriſed in *Gray*'s mortgage, and to pay *Gray* the rent he had received for the ſaid premiſes, but gave no coſts (*a*).

(a) It ſhould ſeem that the plaintiff acquieſced in the examination put in by Gray, and did not enter into evidence; the examination of Gray, and the report being all that were read at the hearing. J. D.

Lyne v. *Ably.*

13 Nov. 1749. On petition to Sir John Strange M. R.

THE defendant's examination was reported inſufficient. The plaintiff afterwards died. The ſuit being revived by his repreſentative, the Maſter was ordered to tax the coſts of the inſufficient examination.

Corporation of *Worceſter* v. *Bennet.*

19 Jan. 1750.

LORD *Hardwicke* C. laid it down as a rule, that all motions for prohibitions are to be grounded on affidavit, not ſuggeſtion.

Ex parte *Whitmore.*

Feb. 1750.

A WRIT of *ne exeat regno* granted, to prevent the huſband from going abroad to avoid payment of alimony recovered, on the authority of *Read* v. *Read*, 1 *Ch. Ca.* 115.

Lloyd v. *Baſnet.*

12 Feb. 1750.

PROCESS of contempt ſtayed againſt the huſband for want of his wife's anſwer, on affidavit that ſhe had left him, and he had no power over her.

Dennet

28 Feb. 1750. Mr. Howard's Minute Book.

Dennet v. *Coker.*

THE defendant *Coker* by deeds conveyed his eſtate to truſtees to ſell, to pay creditors mentioned in a ſchedule, amongſt whom was one *Philip Roderam*. The bill was, to have the truſts of the deeds executed, which was decreed; and the Maſter was to adverti ſe for the creditors to come before him, and prove their debts. *Philip Mitchel*, the executor of the ſaid *Philip Roderam*, proved his debt under the decree. Having afterwards brought an action at law for the debt, he, by an order dated as above, was ordered to elect, whether he would come in under the decree, or proceed at law. If he elected to take the benefit of the decree, he was to be reſtrained from proceeding at law, and ſo *vice verſâ*.

He elected to proceed at law; but on his application his election was diſcharged, and liberty was given him to come in under the decree (*a*).

(*a*) Reg. Lib. A. fol. 208.

1 March 1750.

Price v. *Bridgman.*

Depoſitions of a witneſs examined *de bene eſſe*, who was dead, publiſhed in order to be read at a trial at law.

UPON petition to Lord *Hardwicke* C., anſwered without an attendance, it was by conſent ordered, that the commiſſion under which *George Harris* (who was dead) and others had been examined *de bene eſſe*, and croſs-examined, ſhould be opened by the clerks in Court for the plaintiff, and defendant; and the depoſition of the ſaid *George Harris*, on his original, and croſs-examination, ſhould be publiſhed, copied,

and examined, in order to be uſed on a trial of an action of treſpaſs brought by the defendant againſt the plaintiff's workmen, and agents, for incloſing part of the common in queſtion; and then the commiſſion and depoſitions to be cloſed, and ſealed up again by the ſaid clerks in Court, under their hands, and ſeals.

Price v. *Bridgman.*

Cunningham v. *Cunningham.*

17 May 1750.

Decree *niſi* for default of appearing made abſolute: the defendant afterwards permitted to rehear the cauſe upon terms.

THE defendant not appearing at the hearing, a decree *niſi* was pronounced againſt him, which was made abſolute, after which the defendant obtained an order to rehear.

Upon application to diſcharge the order, Lord *Hardwicke* C. ſaid, the defendant ſhould have applied to diſcharge the order for making the decree abſolute, then have paid the coſts of his default, and have ſhewed cauſe againſt the decree. However, his Lordſhip, to ſave expence, would not diſcharge the order, but directed that on the defendant's paying ſuch coſts as he would have paid for the coſts of his default had he come to ſhew cauſe, to be taxed, and ſubmitting to pay ſuch coſts for the proceedings ſubſequent to the decree, as the Court at the hearing ſhould direct, he ſhould be permitted to re-hear the cauſe.

Kinſay v. *Kinſay*, 11th *July* 1754.—A ſimilar caſe with theſe additional circumſtances: the Maſter had made his report under a decree which had been abſolutely confirmed, and the time thereby appointed for the defendant's redeeming had elapſed.

26 May 1750.

Potter v. *Chapman.*

(Reg. Lib. B. fol. 321.)

Injunction granted on filing the bill, to prevent the defendant from being inducted to a living. Vid. Ambl. 98.

DR. *Potter*, late Archbiſhop of *Canterbury*, by his will, gave all options which ſhould fall to the defendants *Chapman* and others in truſt, to preſent his ſon the plaintiff in the firſt place, and the other perſons named in his will. A vacancy happening, the defendant *Chapman* procured himſelf to be preſented for inſtallation, and induction. The plaintiff filed his bill to be preſented, and for an injunction to prohibit the biſhop from inducting the defendant *Chapman*, or any other perſon, to the ſaid vacancy. Upon filing the bill, and before the defendants had appeared, an injunction was granted as prayed, till anſwer, and further order.

14 Jan. 1753. 3 Atk. 762. S. C.

Evelyn v. *Evelyn.*

(Reg. Lib. A. fol. 94.)

Grandfather not entitled to ſhare the inteſtate's perſonal eſtate with the brother.

THE cauſe ſtood this day for judgment.

Lord *Hardwicke* C.—The bill is to revive a former decree on the death of the plaintiff's brother *John Evelyn*, who died an infant, and inteſtate, and of whom the plaintiff *Charles Evelyn* claims to be the repreſentative, and entitled to his whole perſonal eſtate: and the queſtion is, whether the perſonal eſtate of the inteſtate ſhall go to the plaintiff his ſurviving brother, or whether the defendant Sir *John Evelyn* his grandfather ſhall ſhare with him.

The defendant the grandfather inſiſts he is in the ſecond degree of conſanguinity, by the civil law, and by the Statute of Diſtributions entitled. *Evelyn* v. *Evelyn*.

This hath been determined twice in favour of the ſurviving brother. *Poole* v. *Wilſhaw*, 9th *July* 1708, in the Court of Exchequer, by the unanimous opinion of the five barons; and *Norberry* v. *Richards*, 20th *November* 1749, at the Rolls. And although by the civil law the grandfather and brother are in equal degree of conſanguinity, yet executors, and preferences are let in; and the civil law is not part of the law of *England* further than it is received here. *Collingwood* v. *Pace*, 1 *Ventr.* 413.

By the computation of degrees of conſanguinity according to the law of *England*, brother and brother make one degree. *Blackborough* v. *Davis*, 1 *P. Wms.* 41. And it is unreaſonable the proviſion for a child dying ſhould aſcend to the grandfather; but among brothers, and ſiſters there is a kind of *ſpes accreſcendi*; and I am of opinion that the plaintiff is entitled to all his brother's perſonal eſtate, and that the defendant the grandfather hath no right.

Migliorucci v. *Migliorucci*.

19 Dec. 1750.

If the plaintiff ſtates in the bill he lives abroad, and the defendant obtains an order for time to anſwer, the Court will not order the defendant to give ſecurity to anſwer coſts.

THE plaintiff by his bill ſtated he lived abroad: the defendant being ſerved with a ſubpœna, obtained an order for time to anſwer. On the above day he applied for further time, and that the plaintiff might give ſecurity to anſwer coſts. Lord *Hardwicke* C. ſaid, as the plaintiff by his bill ſtated he lived out of

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the juriſdiction of the Court, the defendant, by praying and obtaining an order to anſwer, had ſubmitted to the bill, that it was now too late to make the plaintiff give ſecurity: that it was meant by the defendant as a dilatory, when he found himſelf preſſed: his Lordſhip therefore denied that part of the motion, which prayed the plaintiff might give ſecurity to anſwer coſts.

Philips v. *Langhorn.*

29 Nov. 1750.

When a plea is allowed, on application, an injunction will be diſſolved abſolutely, becauſe it is to be conſidered as a full anſwer.

THE plaintiff had obtained an injunction until anſwer and further order. The defendant put in a plea to the whole bill, which, on argument, being allowed, he applied to diſſolve the injunction abſolutely. It was oppoſed by the plaintiff; but Lord *Hardwicke* C. ſaid it was proper, and agreed to be the practice, for that a plea allowed was to be conſidered as a full anſwer.

Oats v. *Chapman.*

8 Dec. 1750.
1 Veſ. 542.
2 Veſ. 100.
S. C.

THE demurrer, upon argument, was over-ruled, and the coſts of the demurrer were paid. Upon re-arguing it was allowed; and on application the plaintiff was ordered to refund the coſts he had received.

Mitchel

Mitchel v. Duke of *Mancheſter*.

15 Feb. 1750.

THE plaintiffs the infants ordered to return to the Univerſity to purſue their ſtudies.

Corniſh v. *Acton*.

1 May 1751.

THE defendant had been examined before the Maſter on the account decreed. He was afterwards re-examined upon new interrogatories without an order. Lord *Hardwicke* C. held, the Maſter might regularly do it, as in the courſe of the cauſe new matter might ariſe, and it was in his diſcretion, the decree giving it to him: the words are, "The parties are to be examined upon interrogatories, as the Maſter ſhall direct.

A defendant, after he has been examined before the Maſter upon the account, may be re-examined upon new interrogatories without an order.

Ximenes v. *Franco*.

15 May 1751.

ON application for an injunction to ſtay the defendant from diſpoſing of diamonds, &c. Lord *Hardwicke* C. ſaid, that perſons who come into this Court to prevent the diſpoſition of goods, &c. muſt ſhew a ſpecific right in the property, and that the ſame are in danger of being loſt.

4 June 1751.

Chicot v. *Lequeſne.*

By the decree, all parties were to account, and to produce books, and to be examined before the Maſter: the plaintiff was a merchant at *Amſterdam*, and ſent books; but the defendant inſiſting the plaintiff ſhould come in perſon to make the uſual affidavit, it was on motion ordered, that the affidavit to be made ſhould be ſworn before a notary public at *Amſterdam*, with the intervention of a proper magiſtrate, if neceſſary by the law of *Holland*, to the adminiſtration of the oath.

15 June 1751.

Lumbrozo v. *White.*

Affidavit in one cauſe of a defendant not being to be found, not ſufficient to ground an order to ſerve a clerk in Court in another cauſe, although between the ſame parties; but there muſt be an affidavit in the cauſe in which the application is made.

15 June 1751.

Rowe v. *Bant.*

Sale of a moiety of a debtor's real eſtate, decreed for ſatisfaction of a judgment, and coſts.

The bill to have the benefit of a judgment obtained againſt the defendant's teſtator, was, on hearing on the 6th day of *June* 1746, retained for twelve months, and the plaintiff in the mean time was to be at liberty to revive his judgment in an action of detinue againſt the deceaſed, and to compel delivery.

The

The plaintiff accordingly revived his judgment by *ſcire facias*, and executed a writ of enquiry, and aſcertained damages at 204 *l.* 11 *s.* 9½ *d.*

On hearing the cauſe on the equity reſerved, the Court decreed the plaintiff ſatisfaction out of the teſtator's perſonal eſtate; and if the perſonal eſtate ſhould not be ſufficient, to have liberty to apply for ſatisfaction out of the real eſtate.

The maſter having reported the perſonal eſtate inſufficient, the plaintiff brought on the cauſe again this day, for ſatisfaction out of the real eſtate of the defendant's teſtator.

Lord *Hardwicke* C.—*A.*, *B.*, *C.*, creditors by judgment: *A.* ſues out an *elegit*, and the Sheriff puts him into ſuch poſſeſſion, as entitles him to a perception of a moiety of the rents, and profits of his debtor's real eſtate, till his debt is ſatisfied; he may afterwards take out another *elegit*, for a moiety of the remaining moiety, and ſo on; but *B.* in the mean time ſues out an *elegit* on his judgment, and gets into perception of a moiety of the remaining moiety of the debtor's eſtate, and ſo according to the diligence uſed by either.

In caſe of a decree in this Court for a ſale, the directions are for payment of the creditor's *whole demands*, according to their nature and priority; ſo that *B.* the ſecond judgment creditor may be totally defeated, in caſe the judgment ſhould not be ſufficient for ſatisfaction of both.

The judgment until the *elegit* ſued out and poſſeſſion, is but an equitable judgment; but if a judgment creditor hath ſued out an *elegit*, and gotten poſſeſſion, whereby he hath a ſpecific lien; the Court can-

Rowe v. *Bant.*

not put him on a level with another judgment creditor, who hath not ſued out an *elegit*: if there are two judgments, though neither of them have ſued out an *elegit*, the prior judgment ſhall be *firſt* ſatisfied here, becauſe though the prior creditor hath not ſued out an *elegit* ſo as to have a ſpecific lien, yet neither hath the ſecond judgment creditor ſued out any, and till then, as neither hath uſed the utmoſt legal diligence, and as either of them might, the Court will ſuppoſe, the prior creditor would, were it not to favour the debtor.

His Lordſhip decreed a ſale of a moiety of the real eſtates, for ſatisfaction of the plaintiff's judgment, and coſts.

3d Aug. 1751.

Raſhleigh v. *Buller.*

A ſequeſtration *niſi* againſt a peer or member of parliament for want of his anſwer, if he anſwer, and the anſwer be re-reported inſufficient, the plaintiff muſt move again for a ſequeſtration *niſi*.

A SEQUESTRATION *niſi* had iſſued againſt the defendant a member of parliament, for want of his anſwer. The defendant put in an anſwer which was reported inſufficient; the plaintiff thereupon moved to make the ſequeſtration abſolute, as an inſufficient anſwer was no anſwer, and in ſuch caſe the plaintiff was to go on with proceſs where he had left off.

It was firſt moved on the 1ſt of *Auguſt*, and ſtood over to this day, when, Lord *Hardwicke* C. cited Lord *Clifford's* caſe 2 *P. Wms.* 385, and ſaid, as in that caſe, that it was a hardſhip upon a peer, or member of parliament, that a ſequeſtration, which is in the nature of an execution is the firſt proceſs; ſo when a ſequeſtration *niſi* is granted againſt a peer, or member of parliament for want of an anſwer, it is good cauſe againſt ſuch order, to ſhew an anſwer is put in, and which muſt be allowed for cauſe; and where

where the anſwer is reported inſufficient, the plaintiff muſt move again *de novo*, for a ſequeſtration *niſi*: and his Lordſhip further ſaid, as he found that to be the practice, he would not alter it. *Raſhleigh* v. *Buller.*

Raſhleigh v. *Buller.* 11 June 1752.

INJUNCTION granted of courſe, upon a demurrer to the bill being over-ruled.

Blinkehorne v. *Feaſt.* 26 Oct. 1751.

Coſts where the the heir at law brings a bill to diſpute a will; or a bill is brought againſt him to eſtabliſh a will.

IF a deviſee brings his bill to perpetuate teſtimony, and prays no relief, the defendant is entitled to coſts, if he hath not examined, or only croſs-examined the plaintiff's witneſſes; but if the defendant examines witneſſes on his own part, he is not entitled to coſts.

Where a deviſee brings his bill to perpetuate teſtimony, and prays relief; and brings the cauſe to a hearing; and the defendant, the heir at law, inſiſts on a trial, and the will is eſtabliſhed; on ſuch trial, the Court hath in many inſtances given coſts to the heir, both in this Court, and at law, where he hath not been vexatious, nor guilty of tampering; becauſe he can never afterwards diſpute the will.

If a bill is brought by an infant heir to diſpute a will, and the bill is diſmiſſed, the plaintiff ſhould pay coſts, becauſe he may, notwithſtanding, bring a bill on coming of age, or ejectments; indeed it is not certain, whether another *prochein amy* may not bring a bill.

21 Nov. 1751.

Colebrook v. *Jones.*

THE plaintiff was conſul abroad: the defendant applied, that he might give ſecurity to anſwer coſts, according to the courſe of the Court. Lord *Hardwicke* C. ſaid, he muſt conſider the plaintiff as a land, or ſea officer in the ſervice of his Majeſty, and therefore would not grant it.

5 Dec. 1751.

Wentworth v. *Prince.*

A DECREE for eſtabliſhing the rights of the lord of the manor.

13 Dec. 1751.

Brocker v. *Hamilton.*

THE bill was, to be paid a ſum of money on a note of hand from the defendants: the plaintiff obtained a writ of *ne exeat regno*; upon putting in their anſwer, they applied to diſcharge the writ. Lord *Hardwicke* C. ſaid, he would not have granted the writ had the application been made to him, for the Court will never grant the writ, when the demand is at law; but ſaid, this Court will grant it, in caſe of alimony recovered in the Spiritual Court (*a*), and the party is ſuſpected to be going abroad to avoid payment; and accordingly diſcharged the writ.

(*a*) Vid. Ex parte Whitmore, ſupra.

Wybourn

Wybourn v. *Blount.*

18 Dec. 1751.

Liberty given to a woman defendant, charged by the bill to be married to another of the defendants, to anſwer ſeparately, but without prejudice to any queſtion, as to the validity of the marriage.

THE bill was brought againſt *Catherine Wybourn*, and againſt *John Blount*, who pretended, as the bill charged, to be married to her, to eſtabliſh a will againſt the ſaid *Catherine*, as the heir at law of the teſtator: *John Blount* by his anſwer, inſiſted on the marriage; *Catherine* inſiſted by her anſwer ſhe was not married, and that if married, the marriage was null, and void. On an application to anſwer ſeparately, Lord *Hardwicke* C. ordered, that the ſaid defendant *Catherine*, ſhould be at liberty to anſwer ſeparately from the ſaid *John Blount*, in the bill charged to be married to her, but without prejudice to any queſtion, as to the validity of the marriage.

Hawkins v. *Day.*

17 Jan. 1753, or 1752.

Where payment of a ſimple debt without notice of ſpecialties, is held a good adminiſtration.

THIS cauſe ſtood this day for judgment.

Lord *Hardwicke* C.—Two queſtions ariſe in this cauſe: the firſt is, whether payments made by an executor before any breach of condition of the ſpecialty in queſtion, either of debts of an inferior nature, or of legacies, ought to be allowed as a good adminiſtration againſt the ſpecialty: The ſecond is, whether payment made of debts of an inferior nature, or of legacies, before the executor had notice of the ſpecialty, on which the plaintiff ſues ought to be held as good payment, or adminiſtration, againſt the plaintiff.

If

Hawkins v. *Day.*

If there are many caſes, in which executors are liable to dangers, it is not reaſonable to encreaſe, but rather to deliver executors from them.

As to the firſt queſtion, it is eſtabliſhed in caſe of a bond on ſtatute ſtaple, with condition for performance of covenants, and the obligor or cogniizor dies indebted by ſimple contract, and his executor before notice of the covenants being broken, pays debts by ſimple contract, that is a good adminiſtration.

As to the doubt, at what time any breaches of the conditions were made, and from what time they ought to be computed, it is ſaid, no breach is committed until the account of the principal in the bond is taken, but that is too broadly ſtated; it is true, it could not be ſhewn how much was due, till the account was taken; but if he is at any time guilty of a breach of his covenant to behave with fidelity, that is a breach of the condition of the bond, and in point of law, the penalty is forfeited; and that would bring it to the queſtion, how many of the ſimple contract debts were paid before, and how many after that time.

But as to the payment of legacies, after notice of the bond, and before a breach, I apprehend, that would not be a good payment.

For there have been caſes where the Maſter hath been directed to ſet apart a fund to indemnify an executor, though not againſt common covenants; but it is reaſonable where a man hath been ſurety for an office of great truſt.

And on the *firſt* queſtion I am of opinion, that as to the payment of the debts by ſimple contract by executors before breach of the condition, they are good payments.

As

As to the *ſecond* queſtion, I am of opinion, with regard to the debts in general, that the payment of debts by ſimple contract by an executor in a reaſonable way, and without fraud, or laches on his part before, and without notice of debts by ſpecialty, is a good adminiſtration in point of law. *Hawkins* v. *Day.*

His Lordſhip then cited ſome conſiderable anthorities for that purpoſe. *Davis* v. *Monkhouſe*, in *C. B. Hil. T.* 2 *Geo.* II. & 3 *Lev.* 113. *Vaugh.* 94, and 1 *Mod.* 174.

The diſtinction made, that if an executor is ſued by a ſimple contract creditor, and judgment is obtained againſt him, he having no notice of ſpecialty debts, and for that purpoſe the judgment is *in invitum*, his adminiſtration is good, is an unſound diſtinction, and it will lead to this, that no executor will dare to pay a debt by ſimple contract, without being ſued for it, though he cannot plead the ſpecialties, having no notice thereof, and he muſt pay coſts for it; therefore I am of opinion, that as to the payment of debts before notice of a demand by ſpecialty, they are to be conſidered as good payments; and that the caſe of the New River Company againſt *Brownjohn*, is a ſtrong authority, and concurrent with the afore mentioned opinions.

As to the legacies I ſhould have much doubt, but I will not enter into that part of the ſubject; as to the queſtion, if notice of the bond to two of the co-executors, will affect the third, without ſufficient notice, I am of opinion it will not: it would make an executor liable for the *devaſtavit* of the others.

I think further, all theſe caſes, caſes of hardſhip: here a man is employed as a clerk to a partnerſhip, wherein

Hawkins v. *Day.*

wherein the parties ought to ſtate accounts monthly; and on this foundation, the principal enters into a bond with ſurety for performance of covenants, and the obligees having two good ſureties, ſtate no accounts for eight years together; and this hardſhip is an ingredient in the caſe of the executor.

Grayſon v. *Wilkinſon.*

17 July 1752. 2 Vef. 454. S.C. Vid. Str. 1109.

A will not ſigned by the teſtator in the preſence of witneſſes, but acknowledged by him to the witneſſes to be his ſigning, held to be good as to land.

THE bill in this cauſe was for execution of the truſts of the will of *Thomas Cotes*; the heir at law controverting the will: it appeared the ſame had been atteſted by three witneſſes, in the preſence of the teſtator, but that the teſtator had not ſigned the ſame in the preſence of the three witneſſes, but had only acknowledged that his name ſet thereto was his handwriting.

Mr. Solicitor General for the plaintiff, inſiſted the will was duly executed according to the ſtatute, and cited 2 *Chan. Caſes* 109. *Cook* againſt *Parſons*, *Precedents in Chan.* 184. *Lemain* againſt *Stanley*, 3 *Levins.* 1. *Smith* againſt *Cawdron*, 7th *July* 1732, by Sir *Joſ. Jekyl*, Maſter of Rolls. *Stonehouſe* v. *Evelyn*, 3 *P. Wms.* 252. and *Jones* v. *Lake*, *Hilary* 1742, in *B. R.*

Mr. *Wilbraham* cited *Hoyle* v. *Clark*, 3 *Mod.* 218.

No caſes were cited for the defendant.

Lord *Hardwicke* C.—This is a queſtion at law, but may be determined here on evidence, at the requeſt of the defendants; and I will conſider it on the clauſe of the ſtatute, touching the execution of wills, and then

then how far that clauſe is varied by the clauſe touching revocations. *Grayſon* v. *Wilkinſon.*

Suppoſe a bond, or deed be ſigned, and the witneſs is called in, and the party acknowledges his hand thereto, if the witneſs ſigns it, it is an atteſtation of the act: yet an acknowledgment of ſealing, and delivery is not ſufficient evidence of ſealing, and delivery.

Further in caſe of a note, or declaration of truſt which do not require the ſolemnity of a deed; the witneſs declaring the party did acknowledge his hand, it would be evidence of the party's ſigning.

Therefore, I conceive, upon the firſt clauſe in the ſtatute, if the teſtator having ſigned his will, did before witneſſes declare it to be his hand, it would anſwer the purpoſe of the firſt clauſe; and the caſes import a teſtator may ſign his will, in the preſence of the three witneſſes, at three different times.

I will now conſider how far the clauſe relating to revocations, ought to be coupled in conſtruction with the firſt mentioned clauſe.

And upon that I am of opinion, the clauſe relating to revocations, doth not operate on the firſt clauſe; and I hold, a will may be revoked by another will executed according to the direction of the firſt clauſe, and that the words, "ſigned in the preſence of three or four witneſſes," refer to ſome other writing of revocation to be executed by the deviſor, and not to his will.

Upon the whole, on the peruſing of the act, and on the authorities, I am of opinion, the will is well executed.

It afterwards appearing, the third witneſs, who reſided in *Holland*, had not been examined, the Court ordered

Hawkins v. Day.

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v. *Champion.*

C. held that a wife cannot be taken
for coſts; for coſts are perſonal, and
and a wife hath no property.

27 July 1752.
2 Veſ. 454. S.C.
Vid. Str. 1109.

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A will not ſigned by the teſtator in the preſence of witneſſes, but acknowledged by him to the witneſſes to be ſigning, h be good land.

Brandon v. *Knight.*

ONE *Wardlow* was ordered to ſtand committed for marrying a ward of the Court without permiſſion; a warrant was made out to apprehend him, but he could not be found; afterwards it was diſcovered he was a priſoner in the Marſhalſea for debt: his contempt being criminal, not of a civil nature, he could not be charged in cuſtody, eſpecially as this Court hath no juriſdiction over the Marſhalſea. After conſideration, Lord *Hardwicke* C. ordered an *habeas corpus cum cauſis* to iſſue, directed to the Marſhal of the Marſhalſea, or his deputy there, to bring the ſaid *Wardlow* to the bar of this Court, to anſwer his contempt.

Humphrey

Humphrey v. *Taylor.*

5 Feb. 1752. Ambl. 136. S. C.

Reſidue deviſed to executors in nature of joint tenants, the will is revoked by a codicil as to one, the other ſhall take the whole.

THE teſtatrix by her will gives many legacies, and then to perſons her neareſt of kin, one ſhilling each, and the reſt, and reſidue to the defendant *Taylor*, and *Andrew Wachin*, and makes them executors; this, though not expreſſed, was admitted in conſideration of law, to conſtitute them joint tenants; and by a codicil ſhe revoked her will as to *Wachin*.

The plaintiffs brought their bill as next of kin of the teſtatrix, againſt the defendant *Taylor* for an account, contending that the revocation was a revocation of the whole gift of the perſonal eſtate; or if not of the whole, ſtill it was a revocation of a moiety, that would have veſted in *Wachin*.

Lord *Hardwicke* C.—There is no doubt but in point of law, an executor takes the whole perſonal eſtate, therefore the Eccleſiaſtical court cannot diſtribute.

This Court conſiders executors as truſtees for the next of kin, and liable to diſtribute here, but always ſubject to this; where any thing appears to ſhew the executor was intended to have it, he ſhall take. And what doth the gift of one ſhilling to the next of kin amount to? It is always underſtood they ſhall have no more, and that the defendant may take, as executor, and the deviſe to the next of kin rebuts their equity of a reſulting truſt.

But ſuppoſing the defendant would not take as executor, I am of opinion he is entitled to the whole, by the deviſe; the whole of the eſtate was given to both, and when one dies, or is removed, that would

Humphrey v. *Taylor.*

ſhare it, the other takes. *Littleton*, ſect. 280. If there be a deviſe to two perſons, one capable, one not, the rule of law is, the one capable ſhall take the whole: and this is admitted in Lord *Bridgman*'s argument. In caſes of redemption alſo the law is the ſame. *Davis. Kemp.* 1 *Eq. Ca. Abr.* 216. *Carter* 4. 5. And ſo in caſe of revocation; for it is abſurd to ſay, where the whole is given any part ſhould be diſtributable. *Hunt* v. *Birtles*, by Lord *King*.

Suppoſe inſtead of making a codicil ſhe had ſtruck out the name of *Wachin*, the defendant would have been entitled. She hath done the ſame in words, therefore let the bill be diſmiſſed.

Hil. 1752.

Savery v. *Dyer.*

A perſonal annuity *pur autre vie* not determined by the death of the annuitant.

BILL to be paid the arrears of an annuity given by the teſtator to *A.*, during the life of his executrix. *A.* was dead, having made his will, and the plaintiff his executor, to whom he deviſed his real and perſonal eſtate. The annuity was not charged on the real eſtate, but was conſidered as a perſonal annuity, it being claſſed with the legacies.

The queſtion was, whether the annuity was not determined by the death of the annuitant in the life-time of the *autre vie*.

Lord *Hardwicke* C.—I am of opinion the annuity is not determined; for if a man gives a perſonal thing to another, it wants no words of limitation; and if it is a thing that hath duration after the death of the executor, it is tranſmiſſible; though if a perſonal annuity is given to *A.*, it ſhall go to him for life only;

and if a rent is given out of land to *A.* during the life of *B.*, that ſhall determine by the death of *A.*, in the life-time of *B.*; for it cannot go to the executor, being a realty, and it cannot go to the heir, being no fee: and his Lordſhip cited 1 *Roll's Abr.* 831. pl. 5. *Goſley* v. *Gilford*, 2 *Vern.* 35. *Sewery* v. *Dyer.*

Galway v. Earl of *Barrymore.* 12 March 1752.

BILL brought by the plaintiff for ſatisfaction of a debt due from the defendant the Earl of *Barrymore.*

A debt within the Stat. of Limitations taken out of the ſtatute by words in an anſwer.

The defendant the Earl prepares a draught of his anſwer in his life-time (which was proved), and therein ſays, he will do what is right and juſt, but before the anſwer is put in, he dies: the defendant his repreſentative inſiſts the plaintiff's demands are barred by the Statute of Limitations.

Lord *Hardwicke* C., on appeal, was of opinion, that the words, *he will do what is right, and juſt*, take it out of the ſtatute, and therefore decreed ſatisfaction out of the aſſets.

Where a man creates a truſt for payment of his debts, a debt barred by the ſtatute ſhall be paid.

Fiſhmongers' Company v. *Eaſt India* Company. 18 March 1752.

THE plaintiffs moved the Court this day, that the brick wall built by the defendants cloſe to the wall of the yard, or terrace belonging to the plaintiffs' houſe in *Fenchurch Street*, ſo far as the ſame obſtructed,

Application for an injunction to reſtrain building, ſo as to ſtop up lights, not being ancient lights, refuſed.

Fishmongers' Co. v. *East India* Co.

darkened, or obscured the plaintiffs' ancient window lights, might be taken down, and removed, and for an injunction.

The Counsel for the plaintiffs proposed a trial, what damage it would be to have the intended erection carried higher than their house.

But the defendants' Counsel declined it, and insisted, that as there was a space of seventeen feet between the plaintiffs' house, and their buildings, it could not be considered as a nuisance, there being many streets, and lanes in *London* not so wide; though they admitted it might in some measure obscure the plaintiffs' lights: And they also contendedfor a right to build on their own ground.

Lord *Hardwicke* C.—With respect to granting trials, it is never done but by consent of parties, or with their acquiescence; and here the defendants decline a trial, therefore the question is, whether the plaintiffs' case is such as entitles them to an injunction. As to the necessity of this case there is no ground for an injunction, there being no immediate mischief likely to ensue. And as to the question whether the plaintiffs' messuage is an ancient building, so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here; for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. If the house were built on the old foundation, it would entitle the plaintiffs to their lights as an ancient messuage; but if on the new foundation, then the party must shew a new agreement, or something to import one. The evidence as to that is not clear.

But

Fiſhmongers' Co. v. *Eaſt India* Co.

But I am of opinion it is not a nuiſance contrary to law; for it is not ſufficient to ſay it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city; and here will be ſeventeen feet diſtance, and the law ſays it muſt be ſo near as to be a nuiſance. It is true the value of the plaintiffs' houſe may be reduced by rendering the proſpect leſs pleaſant, but that is no reaſon to hinder a man from building on his own ground.

Therefore, take nothing by the motion.

Wilkie v. *Holme*.

30 April 1752.

A defective execution of a power decreed.

A QUESTION aroſe, whether a will executed in the preſence of two witneſſes only was a legal execution of a power to charge land; and if not a ſtrict execution of the power at law, whether the defect ought to be ſupplied in a Court of Equity.

Sarah Roddam, who ſurvived her huſband, by her will, (without reciting the power given to her by deed of the 14th *May* 1744), charged her eſtate with the payment of the debts of her, and her huſband. The will was executed in the preſence but of two witneſſes, and was not a legal execution of the power.

Lord *Hardwicke* C.—I am of opinion this Court ought to aid the defects in the execution of a power, where it is for a valuable conſideration, as for the payment of debts, or younger children's portions.

I thought at firſt it was dangerous, that there ſhould be a different rule of determining property here, and at law; but where a will operates by way of appointment, there is no danger in it; yet it is true at law

Wilkie v. *Holme.*

that a power to be executed by will concerning lands, muſt be executed according to the ſtatute; and here, in like manner, where the ſame is voluntary.

His Lordſhip cited *Smith* v. *Aſhton*, 1 *Ch. Caſ.* 263. *Tollet* v. *Tollet*, 2 *P. Wms.* 489. Earl of *Carliſle* v. Duke of *Marlborough*, Mich. 1750; and decreed for the execution of the power.

30 April 1751.

Tyſſen v. *Ward.*

Service of a ſubpœna for coſts, the clerk in Court being dead, and the ſuit abated, and no other proceeding to be had, but to recover the coſts, on the ſolicitor for the ſurviving defendant, ordered to be good ſervice.

THE defendants were ordered to pay the plaintiffs their coſts. The coſts were taxed, and a ſubpœna for the coſts was ſued out; but before the coſts were paid, *Elizabeth Ward*, one of the defendants, died: the other defendant ſecreted himſelf, and his clerk in Court being dead, and there being no other proceedings to be had in the cauſe than to endeavour to recover the coſts, and the ſurviving defendant not naming a new clerk in Court, it was ordered, that ſervice of the label of the ſubpœna on the defendant's ſolicitor perſonally, and leaving the body at the defendant's place of abode, ſhould be good ſervice on the defendant.

Eaſt. T. 1752.

Newport v. *Moore.*

(Reg. Lib. B. fol. 312.)

AN infant, ſent by his mother to *Doway* in *Flanders*. The allowance for his maintenance ordered to be ſtopt. He was afterwards brought to *England*, and carried to his mother's abode in the country, from whence

whence he wrote to the Lord Chancellor and the ſolicitor in the cauſe, craving protection. His Lordſhip ordered the meſſenger to bring the infant into Court, which he did; and his Lordſhip referred it to the Maſter, to approve of a proper perſon to be appointed guardian of the infant, and, in the mean time, to remain with the meſſenger.

Newport v. *Moore.*

Banks v. *Farquharſon.*

(Reg. Lib. A. fol. 337.)

15 May 1752. Bank v. Farques. Ambl. 145. S. C.

AT the hearing of this cauſe the preceding *Friday*, the defendant produced a declaration of truſt of ten Sun-Fire ſhares, executed by *William Watts*, ſince dead, and a bankrupt, of whom the plaintiff is aſſignee, and witneſſed by *James Sterling* of *Hills*, in *Scotland*, and *John Bland*, ſince dead. The defendant not having proved the death of *Bland*, and that *Sterling* lived in *Scotland*, he was not admitted to prove the hand-writing of the ſaid *William Watts* to the declaration of truſt, and the ſame was not admitted to be read in evidence. The cauſe was put off until the firſt day of the next term.

Mr. Solicitor General, and Mr. *Wilbraham* on behalf of the defendant alledging the above facts; and that the ſaid declaration of truſt was proper evidence on the part of the defendant, applied this day, for liberty to exhibit an interrogatory to prove the hand-writing of the ſaid *William Watts*, and the hand-writing of the ſaid *James Sterling*, and *John Bland* the witneſſes, inaſmuch as *Bland* was dead, and *Sterling* lived out of the juriſdiction of the Court; which was ordered.

27 July 1752.
2 Ves. 466.
S. C.

Tanner v. *Ivie.*

THE bill was brought on behalf of an infant; and diſmiſſed with coſts. The *prochein amy* was allowed the coſts he paid.

4 July 1752.

Mendes Da Coſta v. *De Paz.*

ORDER for placing out an infant apprentice to a particular perſon named, and paying the apprentice fee, *without a reference*, the Counſel for the father alledging, he thought it proper.

12 June 1755.

Attorney General v. *Berryman.*
(Reg. Lib. A. fol. 148.)

The King's ſign manual directed to be applied for, to diſpoſe of 500 l. of a teſtator's eſtate given to a truſtee to diſpoſe in charity in his diſcretion, which he never executed.

HUMPHRY Chetham, by his will, gave 500 *l.*, to be paid in twelve months after his death, to be diſpoſed in charity at the *diſcretion* of Dr. *Berryman.* He never exerciſed it, but by his will directed, in caſe he ſhould not receive the 500 *l.*, his brother ſhould, and diſpoſe of it at his *diſcretion*, and appointed his wife executrix. She proved the will. The executors of *Humphry Chetham* being adviſed they could not pay the 500 *l.* with ſafety, inſtituted this ſuit for the direction of the Court. The defendant *Berryman*, the brother of the above Dr. *Berryman*, by his anſwer ſaid, the teſtator *Chetham* uſed to go to daily prayers at the pariſh Church of *St. Andrew Underſhaft*, and that

Attorney General v. *Berryman.*

that he had diſcourſed with the ſaid teſtator about leaving ſome legacy towards the ſupport of ſuch daily prayers, and that Dr. *Berryman* had written with his own hand on the back of a recommendatory letter the names of ſome perſons he declared he intended to be partakers of the charity.

On the 11th *February* 1752, the cauſe was heard, when Lord *Hardwicke* C. held the legacy to be a good, and ſubſiſting legacy; but as Dr. *Berryman* had not executed the truſt repoſed in him, it reſted with the Crown, and therefore recommended it to the parties to apply to his Majeſty to diſpoſe of the legacy.

The executors of the teſtator *Chetham* and the defendant *Berryman* applied for, and obtained his Majeſty's ſign manual, authoriſing and requiring his Attorney General to make a motion to the Court of Chancery for the payment of 465 *l.* to *Richard Cotton*, one of the executors of the teſtator *Chetham*, and to the defendant *Berryman*, to be diſpoſed by them to the ſeveral perſons, and to the uſes following, *viz.* to the truſtees of the pariſh of *St. Andrew Underſhaft, London*, or to the truſtees of the ſaid pariſh for the time being, in truſt for the better ſupport of the daily prayers in the ſaid church 200 *l.*; to *Thomas Bathurſt* 80 *l.*; to *Eliz. Wood* 20 *l.*; to *James Wagſtaff* 10 *l.*; and to divers other perſons, ſome 2 *l.* 2 *s.*, others 1 *l.* 1 *s.* each.

On the 12th *June* 1755, the ſaid legacy was ordered to be applied agreeably to the ſign manual(*a*).

(*a*) Iſaac v. Gompertz, 23 July 1792. Legacy given to a Jewiſh charity not being permitted to take place, the legacy paid in moieties, purſuant to his Majeſty's ſign manual; one moiety to the Magdalen Hoſpital, the other moiety to the London Infirmary.

Horne

15 July 1752.

Horne v. *Laney.*

AN infant was arreſted and thrown into priſon for neceſſaries: an *habeas corpus* was granted to bring him into Court to have a guardian aſſigned. It was attempted by petition, which was thought by Lord *Hardwicke* C. improper, and therefore it was moved for.

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31 July 1752. 2 Vel. 431. S. C.

Donatio mortis cauſâ.

Ward v. *Turner.*

THE plaintiff, as repreſentative of *John Moſely*, brought his bill to have a transfer of 600 *l.* new South Sea annuities, and ſeveral ſpecific parts of the perſonal eſtate of *William Fly*, delivered to him; and to have an account of what was due to *Moſely* for ſervices done to *Fly*.

It appeared, that *Fly* in hs life-time had expreſſed great kindneſs for the plaintiff's teſtator; and in the preſence of one *Mounſey*, a witneſs, had taken three transfer receipts for 600*l.* South Sea annuities, and declared he would give them to the plaintiff's teſtator; and in the preſence of one *Greentree*, another witneſs, taking the key of his ſcrutore, took out three papers, and ſaid, "Here *Moſely*, I give you theſe three papers: theſe are for South Sea ſtock, and will ſerve you, when I am dead;" and in the preſence of one *Taylor* declared, he gave the plaintiff's teſtator all the goods, and plate in his houſe, ſave his ſword, gun, and books.

Lord

Lord *Hardwike* C.—Suppoſe the facts above ſworn to were well proved, what is the law ariſing on theſe facts? *Ward* v. *Turner.*

Firſt, as to any part of the things given, except the 600 *l.* South Sea annuities, I am of opinion the gift is not good, there being no pretence of any delivery, and it is too general. If they prove any thing, they muſt prove a nuncupative will.

Then for argument's ſake, take the gift of the 600 *l. South Sea* annuities, as an independent donation; the queſtion is, whether it be ſuch a gift as the law of *England* will allow as a *donatio cauſâ mortis.* And firſt the fact of the gift is proved only by *Greentree*; whereas the civil law requires five witneſſes, and limits it in point of value. Vide *Juſtinian's Inſtitutes.* The expreſs gift ſworn by *Greentree* is of the three receipts only, which the plaintiff would conſtrue as a gift of the *South Sea* annuities.

The queſtion that ariſes is: whether the delivery of the thing, given by way of *donatio cauſâ mortis*, is neceſſary; and if neceſſary, if this delivery of the three receipts is a ſufficient delivery. I am of opinion a delivery is neceſſary, and that the delivery of the three receipts is not ſufficient to validate this act.

In the Roman law there are three kinds of *donatio mortis cauſâ:* Firſt, where the property in the thing doth not veſt, until the death of the donor: Second, where the property immediately paſſes, but is defeaſible, in caſe the donor recovers: Third, where the donor moved with preſent danger, doth not think it ſo immediate as to give the party a veſted intereſt in them, but only to take effect, when the donor dies.

Now

Ward v. *Turner.*

Now as to the ſecond, the civil law requires a delivery; but as to the firſt, and third, not an abſolute delivery, becauſe the property doth not completely paſs till the death of the donor.

But the civil law is not binding in this county, farther than it hath been received, and allowed here, and that muſt be determined by authorities; and the reſult of the authorities is, that the civil law hath been received in *England*, only ſo far as the gift hath been attended with delivery; *Swinburne*, Part 1ſt. Sect. 6. *Drury* v. *Smith*, 1 *P. Wms.* 404. *Lawſon* v. *Lawſon*. ibid. 441. *Jones* v. *Selby*, *Precedents in Chan.* 300. *Hedges* v. *Hedges*, ibid. 269. *Snellgrove* v. *Bailey*, *March* 1744. 3 *Atk.* 214. *Miller* v. *Miller*, 3 *P. Wms.* 356.

Then I come to the queſtion, whether the delivery of the three receipts is a delivery of the thing: I am of opinion, it is not, and find no authority for it; the delivery of the thing given, is what is relied on in all the caſes; the only caſe where a ſymbol was held good, was in *Jones* v. *Selby*; the key of the trunk wherein the thing was kept (Exchequer Tallies), but I am of opinion that amounted to a poſſeſſion in the donee of the tallies, for the donor was reſtrained from making uſe of them, without the conſent of the donee, and the donor could not rightfully come at them, without the key.

I think in like manner, as to a key of a warehouſe for goods, or of a wine cellar.

But as to the delivery of the receipts for the ſtock, it amounts to nothing; they being of no uſe after the acceptance of the ſtock, and are ſeldom kept.

Suppoſe a mortgage, and a ſeparate receipt taken for the conſideration money, and the receipt is delivered

vered over, it could not be a delivery of poſſeſſion. *Wood v. Turner.*

Upon the whole I am of opinion this gift is not valid, without a transfer, or ſomething that amounts to a transfer, and it being unaccompanied with a delivery is merely legatory, and amounts to a nuncupative will, and allowing it would be a breach of the Statute of Frauds *(a)*. Therefore let the bill be diſmiſſed as to the gifts claimed.

(a) See Sect. 19, 20, 21, and 22, of that ſtatute.

Ferrar v. *Ferrar.*

26 July 1752.

When a defendant hath obtained an order for time to anſwer he cannot refer the bill for impertinence; but ſcandal may be referred at any time.

THE defendant having obtained an order for time to anſwer, he applied and obtained another order to refer the bill for impertinence: on application to diſcharge the laſt order, Lord *Hardwicke* C. ſaid, the general rule of the Court is, that where a defendant hath obtained an order for time to anſwer, he cannot apply to refer the bill for impertinence, but he may for ſcandal at any time, the honor of the Court being concerned, to ſee there is no blot in the record, and cited *Doughty* v. *Heathcote*, 15 *June* 1738.

White v. *Hayward.*

25 July 1752. 2 Veſ. 461. S. C.

Suit may be revived for coſts after they are taxed, coſts taxed being a judgment.

LORD *Hardwicke* C.—In this caſe upon hearing the cauſe, the plaintiff's bill was diſmiſſed with coſts, which were taxed; the plaintiff did not pay them, but ſtood out proceſs of contempt to a proclamation, whereon he was taken, and is now in the Fleet Priſon; ſince which the defendant to whom the coſts were to be paid is dead, and the priſoner applies to the Court to be diſcharged, on a ſuppoſition, that by the defendant's

White v. *Hayward.*

death, the cauſe is out of Court, and his impriſonment being for a contempt in not paying coſts only, the ſuit is at an end by the defendant's death, and cannot be revived againſt him. But in the preſent caſe, the coſts are taxed, and become a certain duty, and remain ſuch, notwithſtanding the death of the defendant, which diſtinguiſhes this caſe from ſuch caſes, as where according to the rule of *actio perſonalis moritur cum perſonâ*, they are conſidered as a tort, or puniſhment, and by the death of either party, before the recovery, they drop, and are gone.

The priſoner, therefore, is to be conſidered in execution for a certain debt, or duty; the coſts, which he is ordered to pay, being actually become ſuch; and in order to determine the queſtion, whether the priſoner may be lawfully detained on this proceſs, wherein he is in cuſtody, I ſhall conſider how far the proceſs of this Court, is like that at common law; the proceſs of this Court for contempt, being ſupported by its analogy to that of common law. And there the proceſs goes *in perſonam, et rem.* Suppoſe a judgment obtained by the defendant againſt the plaintiff: the ſtatute gives him coſts, and he hath a right to take out execution for them; or ſuppoſe a plaintiff hath a judgment for debt and coſts, and he takes out a *capias ad ſatisfaciendum*, and the defendant be in execution thereon, and the plaintiff afterwards dies, the defendant will have no right to be diſcharged.

There is a great difference between original, and judicial writs; the death of the party will abate the former; whereas the latter are not ſo abatable, but the perſon in execution muſt ſo remain till ſatisfaction made

made of the debt, or duty, for which the writ was ſued out, though the party ſuing out be dead. *White* v. *Heyward.*

It was indeed formerly held, and Lord *Hobart* was of that opinion, in *Foſter* v. *Jackſon*, *Hobart* 52. that where the party taken in execution died, the debt was thereby ſatisfied, and no remedy might be had againſt his repreſentative, or eſtate for the debt; but at the ſame time, Lord *Coke* was of a contrary opinion, and to reconcile this difference, the ſtat. of 21 *James* the 1ſt. ch. 4. was made, whereby a new execution is given againſt the eſtate, and effects of the party ſo dying.

I do not know any caſe in the books which hath a greater affinity to the preſent than *Clerk* v. *Withers*, 1 *Salk.* 323. The adminiſtrator ſued out a *fieri facias* on a judgment, which was delivered to the ſheriff the 1ſt of *Auguſt*, who ſeized the defendant's goods, and afterwards, *viz.* the 9th of *September*, the adminiſtrator died; the ſheriff returned, that he had ſeized goods to the value, but they remained in his hands, *pro defectu emptorum*, and on the 20th of *September*, that ſheriff was removed, and a new one ſworn in; and the defendant ſued the old ſheriff to have his goods again, and judgment being againſt him in the Court of Common Pleas, error was brought here; and it was objected for the plaintiff in error, that the execution was abated, and nobody could perfect it: not the executor of the adminiſtrator, becauſe he came in *in autre droit*; and the adminiſtrator *de bonis non*, could not, for he was paramount; and that this was not within the ſtat. of 17 *Car.* 2. ch. 13. for that only regards caſes after verdict: but *per curiam*, this *ſcire facias* againſt the ſheriff is not maintainable, and ſeveral reſolutions were made in the caſe, the firſt of which is, that the

White v. Hayward.

the plaintiff's death did not abate the *fieri facias*, and that the ſheriff, notwithſtanding that, might proceed in it, becauſe he had nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into Court, which the plaintiff doth no way hinder; beſides an execution is an entire thing, and cannot be ſuperſeded after it is begun. This was a determination in the time of Lord Chief Juſtice *Holt*, and it hath never been contradicted; and it hath been reſolved, that where a *capias ad ſatisfaciendum* was taken out, and delivered to the ſheriff, who took the party thereon, and returned a *cepi* on the writ, although the plaintiff were dead at the time of the actual taking, the executor or adminiſtrator, without any new proceſs, or revival, hath a right to have the body of the defendant in execution, which the law gives him as a pledge for the debt.

The writ of *capias ad ſatisfaciendum* directs the ſheriff to take the body *ad ſatisfaciendum* the plaintiff's debt. The ſatisfaction is the end of the writ, which attaches him from the inſtant it comes into the hands of the ſheriff; and the plaintiff hath no further act to do, but to receive ſatisfaction; nay it was formerly held, that executions attached from the time the writ bore teſte.

In the caſe before me, the plaintiff is in execution; but that makes no alteration in the reaſon of the thing, becauſe a defendant may be conſidered as an actor to a particular purpoſe with equal propriety, as a plaintiff originally ſo called.

I think a ſequeſtration in this Court hath the neareſt analogy to a ſpecial *capias utlegatum*. Diſobedience is the ground of both proceſſes: but although this

ſort

ſort of proceſs iſſues for contempt, it is likewiſe for a debt or duty; and where the ſequeſtration is ſolely for a contempt, it dies with the party who ſues it out, which makes the eſſential difference between that, and the proceſs in the preſent caſe, where it is in nature of a *capias ad ſatisfaciendum* a certain debt. *White v. Hayward.*

In anſwer to the objection, that if in the preſent caſe, there is no repreſentative of the deceaſed defendant before the Court, and the cauſe be out of Court, perhaps the priſoner may remain perpetually where he is; if the deceaſed defendant hath made no will, and nobody would take out adminiſtration to him, and ſo a conſiderable time ſhould run, and the priſoner made application to the Court for his diſcharge, and at the ſame time offered to pay the coſts, for which he is in cuſtody; the Court would, in caſe no repreſentative came before the Court, on the beſt notice that could, in ſuch a caſe, be given, and proof thereof laid before the Court, exerciſe it's diſcretion, and perhaps diſcharge the priſoner; but that is not now the caſe; and the Court will give a proper time for the defendant's repreſentative to come in, and revive, and not at this time diſcharge the plaintiff, who is impriſoned not for contempt, but is to be conſidered in execution for a debt: And on the other hand, no repreſentative appearing before the Court, to whom the ſatisfaction for which the priſoner is detained, may be made, it will be very hard to render him a perpetual priſoner, and therefore the priſoner muſt be remanded; and let the repreſentative of the deceaſed defendant revive on, or before the laſt day of Michaelmas term, otherwiſe, let the priſoner be diſcharged from his impriſonment.

20 Nov. 1753.

Rowe v. *Beavis.*

RENTS and profits of a real eſtate deſcended, are to be accounted for, and applied, before the inheritance is ſold, and applied.

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29 Oct. 1743. Vid. 2 Veſ. 116. In May.

Bedford v. *Coke.*

(Reg. Lib. A. fol. 121.)

Arrears of annuity, and ſimple contract debts, though liquidated by the report, do not carry intereſt.

PHILIP late Duke of *Wharton*, being indebted by mortgage and otherwiſe, by indentures of leaſe and releaſe dated 19 and 20 *March* 1691, conveyed eſtates therein mentioned, to the Honourable *A. Denton*, *Gibſon*, and others, in truſt, to ſell any part thereof for payment of his debts, &c. On hearing the original cauſe, the 19th of *Auguſt* 1723, on a bill filed by the creditors for the purpoſe, the truſts of the deeds were decreed to be executed, and the eſtates to be ſold, and the purchaſe money to be paid to the truſtees, to be applied, firſt, in payment of the mortgages, and incumbrances according to their priority, and then of the other creditors, and the ſurplus to be paid to the Duke.

The Duke afterwards went abroad, and was outlawed, and attainted of high treaſon; and dying ſo outlawed, and attainted, his eſtates became forfeited to the Crown. While in *Spain*, he married a *Spaniſh* lady, and by indentures of leaſe and releaſe, dated the 13th and 14th of *Aug.* 1726, after reciting his marriage, and that by articles of agreement previous thereto, he had agreed to ſettle on her 500*l.* a year by way of pin-money, and 1200*l.* a year, as and for her

her jointure, and in lieu of dower, he, in purſuance of the agreement, conveyed his eſtates in *Bucks*, *Weſtmorland*, *Cumberland*, *York*, and *Middleſex*, and all his lands, &c. to truſtees, upon truſt, out of the rents and profits, or by leaſe, to pay thoſe annuities, in lieu of dower, and reciting, that the Duke's ſaid eſtates were incumbered, and that he thought himſelf bound in honor to ſecure the ſaid annuities, he confeſſed a judgment to ſecure the ſaid two annuities, in caſe the Ducheſs ſhould be evicted from the eſtates.

The Duke being dead, by letters patent, dated 24th of *April* 1733, the Crown granted the Duke's eſtates, to the ſame truſtees, upon truſt, to ſell the ſame, or any part thereof, for payment of the Duke's debts, and to apply the ſurplus to the uſe of the Lady *Jane Coke* and Lady *Lucy Morris*, his ſiſters, and co-heireſſes at law: Lady *Lucy Morris* afterwards died inteſtate; and Lady *Jane Coke* who ſurvived her, became entitled the whole ſurplus.

Part of the eſtates were ſold in 1738, purſuant to the decree in the original cauſe, and the mortgages and incumbrances, were paid according to their priorities.

The Duke having contracted freſh debts after the execution of the truſt deeds, and difficulties ariſing from the claims of the Ducheſs, and other creditors, reſpecting the priority of their demands; the preſent ſuit was inſtituted to carry into effect the former decree, and to ſettle the priorities of the different claimants.

Upon hearing the cauſe, the 25th, 27th, 28th, and the 29th *October* 1743, the Lord Chancellor declared, that the 500 *l.* a-year to the Ducheſs for pin-money,

Bedford v. *Coke*.

was to be conſidered as ſatisfied, to the time of the death of the Duke, and that from that time there was to be taken an account of what was due in reſpect of it, and likewiſe for the 1200 *l.* a-year; and the Maſter was alſo to take an account of what was due to all the other creditors of the Duke of *Wharton*, and to compute intereſt on ſuch of their debts as carried intereſt, according to the rate of intereſt they carried; and the Maſter was to carry on the accounts directed by the original decree of the truſt eſtates in the deeds of 1691, and ſtate the ſurplus; and the Maſter was to inquire, what other eſtates there were of the late Duke, not compriſed in the deeds of truſt, and they, or ſo much thereof as was neceſſary, were to be ſold, and the money applied in payment of the debts, &c.

Upon taking the account of what was due to the Ducheſs under the decree which is dated 29th *Nov.* 1743 (*a*), under the title of *Bedford* v. *Gibſon*, in reſpect of the ſaid annuities, it appeared by the report, which is dated 4th *Auguſt* 1750, that there was due on account of it 22,848 *l.* 11 *s.* 1¼. and the annuity not having been regularly paid, and being her principal ſupport, ſhe was under the neceſſity of taking up money at intereſt, to maintain herſelf.

(*a*) Reg. Lib. A. fol. 121.

(*b*) 7 Dec. 1752

A motion was this day (*a*) made by Mr. Solicitor General, Mr. *Noel*, and Mr. *Wilbraham*, on behalf of the Ducheſs of *Wharton*, to be paid intereſt for the arrears of her annuity from the confirmation of the Maſter's report liquidating the arrears.

A ſimilar application was alſo made on behalf of the ſimple contract creditors, upon what was due to them reſpectively, although the conſideration of in-

tereſt was not reſerved, nor any direction relating to intereſt given by the decree. *Bedford v. Cohe.*

Mr. Attorney General and Mr. *Ord* were counſel for the plaintiffs.

Lord *Hardwicke* C.—The queſtion in this caſe, is, whether, where a decree directs an account of the principal money, and not intereſt, and doth not even reſerve intereſt, the liquidated ſum upon the account taken ſhall carry intereſt from the confirmation of the report. The caſe is hard, and if I could come at it agreeably to the rules as acknowledged, I would do it.

Here intereſt is not even reſerved by the decree, and intereſt for the arrears of an annuity is not ſtrictly due, but depends upon the circumſtances of the caſe.

Sometimes there may be a legal remedy for intereſt, but where there is no legal remedy, the Court hath, at it's diſcretion, given it

The firſt queſtion, therefore is, whether the Duchеſs is intitled to it by the ſtrict rule of the Court, as a *rem judicatam?* If not, ſecondly, whether the Court hath a diſcretionary power to give it?

As to the firſt queſtion, whether the Ducheſs is entitled to intereſt by the rule of the Court, I am of opinion, ſhe is not; for at law, where there is no penalty, you can have no intereſt, yet where there is a penalty, you may levy the whole.—But it is true you have another method to come at it, if inſtead of taking out execution, you bring an action of debt on the judgment. So it ſtands at law.

How is it then in this Court? If a decree is made for a ſum of money, and there is a delay in payment, I do not know the plaintiff can come, and pray intereſt;

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But the method where a decree is made for an account, and the Maſter *is to compute intereſt*, is this: the Maſter *in computing ſubſequent intereſt, computes it on the liquidated ſum from the confirmation of his report.*

I do not recollect an inſtance, and have not heard one cited, where the Court hath gone the length of what is now prayed: If any can be found to warrant me in doing it, I ſhall be pleaſed; therefore let the motion ſtand over, and let precedents be ſearched.

It ſtood over from time to time for four months; ſearch was made by Mr. *Howard* and the other Regiſters, and by gentlemen at the bar; but none were met with, and the motion dropt (*a*).

(*a*) Vid. Morgan v. Morgan, infr. Cotton v. White, 17 June 1752. Mrs. White was directed to be paid arrears of an annuity with intereſt from the confirmation of the report. Vid. alſo Anon. 2 Veſ. 661. and Bignal v. Brereton, infr. J. D.

18 Dec. 1752.

Joyce v. *Barker.*

ON application that the plaintiff might elect to proceed in this Court, or at law; liberty was given to make a ſpecial election to proceed in this Court for the two years' rent in queſtion, which had incurred before the defendant came into poſſeſſion, and at law, for the rent accrued in the defendant's own time.

1752.

Bradley v. *Crackenthorp.*

DEPOSITION of a witneſs examined *de bene eſſe*, directed to be publiſhed in order to be uſed at a trial at law, the witneſs being aged, and infirm, and unable to travel.

Manly v. *Eyton.*

23 Jan. 1753.

ON application that the tenant might pay his rent, it was referred to the Maſter to take an account of what was due from him for rent. The Maſter having made his report, on affidavit of ſervice of the report, and of demanding what was reported due, and that the tenant had not paid, he was ordered to ſtand committed without appointing a day for it.

Garth v. *Cotton.* (a)

5 Feb. 1753. 3 Atk. 751. S. C. 1 Vef. 524. 546. S. C.

LORD *Hardwicke* C.

The End of the bill is, that the defendant may account, and make ſatisfaction to the plaintiff for all ſuch ſums of money as he hath received by a fall of timber upon the eſtate in queſtion in the year 1714, with intereſt.

The caſe is this: *Richard Garth* Eſquire being ſeiſed in fee, by will deviſed to *Richard Bovey*, father of the plaintiff, for ninety-nine years, if he ſhould ſo long live, without impeachment of waſte, voluntary waſte excepted, on condition he took upon himſelf the ſurname of *Garth*; and from and after the forfeiture or determination of that eſtate, to the uſe of truſtees during the life of the ſaid *Richard Bovey*, in truſt to preſerve contingent eſtates, but nevertheleſs to permit the ſaid *Richard Bovey*, at and after his full age of twenty-one years, to receive the rents, iſſues, and profits thereof during his life, with remainder to his

(a) This caſe was copied from Lord Hardwicke's written argument. J. D.

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first, and other sons in tail male. After this there are remainders to *Avery Garth* and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir *John Hind Cotton*, the defendant's grandfather, in fee simple.

Of this will the testator made *Catherine* his wife executrix.

On the 18th *July* 1700 the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of *Garth*.

Sir *John Hind Cotton*, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir *John Hind Cotton*, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th *February* 1713, the plaintiff's father executed a letter of attorney to *Reginald Marriot*, authorising him to come to an agreement with Sir *John Hind Cotton*, the remainder man in fee, for a fall of timber on the estate.

On the 16th of *July* 1714, articles were entered into between the plaintiff's father, by Mr. *Marriot* his attorney on the one part, and Sir *John Hind Cotton*, the defendant's father, on the other part; reciting, that the plaintiff's father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir *John Hind Cotton* in fee; that the plaintiff's father had then no issue male; that he had desired Sir *John Hind Cotton* to consent to the cutting down, and selling

part

part of the timber then ſtanding, and growing upon the premiſes.

Upon theſe recitals, it is agreed that ſome perſon authoriſed by the plaintiff's father, and ſome perſon authoriſed by Sir *John Hind Cotton*, ſhould view, and mark what timber trees were then fit to be cut down. That then the parties ſhould agree, and appoint by writing under their hands, how many of the trees ſo marked ſhould be cut down, and ſold for the beſt prices that could be got.

That Sir *John Hind Cotton* ſhould not take any advantage of the cutting of the timber, nor ſhould it be eſteemed waſte, nor any advantage taken thereof on pretence of it's being waſte,

The firſt truſt of the money to ariſe by ſale of the timber is, that it ſhall be applied to pay all ſuch debts as were owing by the teſtator at his death, together with the legacies by him given, which have not, nor ſhall be paid out of the perſonal eſtate, (although it is admitted, by the anſwer of the original defendant Sir *John Hind Cotton*, the defendant's father, that the eſtate deviſed was not ſubject to the payment of the teſtator's debts): that the reſidue of the money ariſing by the ſale of the timber ſhould be divided into moieties between the plaintiff's father, and the late Sir *John Hind Cotton*.

The articles then take notice, that there was a ſum of 1787*l.* 5*s.* 6*d.* then in the hands of one of the Maſters of this Court, being the produce of timber ſold off the eſtate, by Sir *John Hind Cotton*, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money ſhall be paid out of Court, and

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and applied to the ſame purpoſes as the money to ariſe by the timber then to be felled.

It is further agreed that the death of the plaintiff's father without iſſue male, or his having iſſue male on the death of Sir *John Hind Cotton*, ſhould make no alteration in the terms thereby agreed on, but that the parties, their executors or adminiſtrators, ſhould, notwithſtanding any death or alteration, have the like ſhare and benefit of the wood and timber to be felled, and cut down, as if all ſuch wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir *John Hind Cotton*, before ſuch death, or alteration.

Then follows a clauſe for applying the teſtator's perſonal eſtate, in the firſt place, to the payment of his debts and legacies.

Sir *John Hind Cotton*, the original defendant, admits by his firſt anſwer (which is not replied to); that he received about the ſum of 1000 *l.* for his ſhare of the money for which the timber was ſold.

At the time of entering into theſe articles, and when the timber was felled and diſpoſed of, the *plaintiff was not born*, but his father was then married to *Mary Pullen* his firſt wife; and it is ſworn by the firſt anſwer, that he had been married to her for ſeveral years without having any iſſue, and was not then likely to have any by her.

In *September* 1716, ſhe died without ever having had any iſſue, and ſome time after the plaintiff's father intermarried with *Elizabeth Emerſon*.

On

On the 26th of *May* 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of *January* 1727, the plaintiff's father died, leaving the plaintiff, his only ſon, an infant, who then became entitled to the eſtate as tenant in tail in poſſeſſion.

On the 26th of *May* 1745, the plaintiff attained his age of twenty-one years, and in Trinity Term following ſuffered a recovery of the eſtate to the uſe of himſelf, and his heirs.

On the 20th of *May* 1748, the original bill was brought by the plaintiff againſt Sir *John Hind Cotton*, who dying before a determination, the ſuit hath been revived againſt the defendants his executors, and the ſame relief is prayed out of his aſſets; And aſſets are admitted.

Upon this caſe the general queſtion is, whether the plaintiff is entitled to ſatisfaction for ſo much as Sir *John Hind Cotton* the father received out of the inheritance by the fall, and ſale of timber before the plaintiff came in *eſſe*, and conſequently before he had any eſtate in him in the land, and whilſt the remainder, which veſted in him afterwards, reſted in mere contingency, or poſſibility.

This hath been admitted at the bar on all ſides to be entirely a new queſtion, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted alſo, that the plaintiff can have no remedy at law, either in his own name, or in the names of the truſtees, to preſerve contingent remainders,

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mainders, but that his only poſſible remedy is in a court of Equity.

This made it neceſſary for the Court to proceed with great deliberation before a deciſion was made, which would be the firſt precedent after the invention of truſtees to preſerve contingent remainders, now about a hundred years ſince, and which may have extenſive conſequences as to other caſes that may ariſe.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be neceſſary to take ſeveral matters into conſideration; to lay down ſome that are plain, and to clear, and eſtabliſh others, that appear more doubtful.

Firſt, That the ſtripping of this eſtate of the timber was a wrongful act, is clear from the nature of the limitations.

The plaintiff's father was only tenant for years, puniſhable for wilful waſte, and had no preſent right to, or intereſt in the timber, other than the maſt, and ſhade, and neceſſary botes.

The defendant's father had no preſent right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was veſted in him ſubject to open, and let in the contingent remainder when a ſon ſhould come in *eſſe*; and in that quality the timber part of the inheritance was veſted in him; but he had no preſent right to take, and uſe it. The truſtees, who were ſeiſed of the freehold, might have reſtrained him in this Court by injunction; and the plaintiff might have brought an action of treſpaſs againſt him, for his entry, and tortious act.

Further,

Further, it was the duty of the plaintiff's father ſo to have done, not only in reſpect of the treſpaſs upon himſelf, which he might have waived, but in reſpect of the privity which was in expectancy between the tenant for years, and the contingent remainder man, when he ſhould come in *eſſe*: for between the tenant for years and the leſſor, or the remainder man of the inheritance, there is a privity. And before the Statute of *quia emptores terrarum*, a tenure aroſe, and this makes a tenant for years a kind of fiduciary for the leſſor, or the remainder man, who ſtands in his place. *Garth v. Cotton.*

As this act was wrongful both in Mr. *Garth* the plaintiff's father, and the late Sir *John Hind Cotton*; ſo this wrong was committed colluſively between them: when I ſay colluſively, I do not mean an injurious intention, for they might miſtake their right; but that will not vary the caſe in reſpect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to this, the plaintiff's father is recited to have the freehold, which he had not: A colour is given to the tranſaction as if it were for payment of the debts of the father, to which it is admitted the eſtate was not liable: And it is expreſsly ſtipulated, that even in caſe the plaintiff's father ſhould die, leaving iſſue male, before all the timber ſhould be felled, and the money divided, the parties to theſe articles, *i. e.* the tenant for years, and the remote remainder man, ſhould have the ſame ſhares, as if all the timber had been felled, and the money divided before ſuch death, or alteration had happened.

Can

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Can there be a ſtronger proof of colluſion than this? The tenant for years enters into an agreement, not only contrary to his general privity, and truſt, (if I may ſo ſpeak), but both the parties bind themſelves in plain terms to injure the remainder man, even after his eſtate ſhould become veſted, if that event ſhould happen before this deſtruction was completed.

The next thing which is plain, and ſelf-evident is, that this wrongful colluſive tranſaction hath turned to the damage, and loſs of the plaintiff.

The next enquiry is, whether the plaintiff is entitled to any remedy in this Court upon the principles of equity.

At law it is admitted, as I ſaid before, that he can have none: And it muſt be admitted further, that if the limitation to truſtees to preſerve contingent remainders had been out of the caſe, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been ſuch a limitation to the truſtees, all the contingent remainders would have been void, for want of an eſtate of freehold to ſupport them; and Sir *John Hind Cotton* would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no ſuch limitation to the truſtees, the plaintiff could even then have been entitled to no remedy, becauſe his whole uſe in the land, whilſt it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or ſurrender to the remainder man veſted. And there could

could have been no pretence for this Court to interpoſe to preſerve, or reſtore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore the ſtreſs, and foundation of the plaintiff's equity depends entirely upon the eſtate limited to the truſtees to preſerve the contingent uſes, and the conſequences from thence.

In order to determine concerning the force, and operation of this in the preſent caſe, I will conſider,

Firſt, What is the intention, and uſe of creating limitations to truſtees for preſerving contingent remainders.

Secondly, What eſtate ſuch truſtees take in point of law, and what actions they may maintain at common law.

Thirdly, What is the nature, and extent of this truſt in equity, and what remedy they may purſue in this Court.

Fourthly, How far, and in what caſes ſuch truſtees may be charged in equity for a breach of truſt, or any other perſon be affected by their acts, or *laches* in breach of their truſt.

Firſt, The intention of limitation to truſtees to preſerve contingent uſes, took it's riſe from the determination of two great caſes, reported by Lord *Coke* in his firſt volume; *Chudleigh*'s caſe, Hil. 31 *Eliz.*, and *Archer*'s caſe, Mich. 39 *Eliz.*; though it was ſeveral years after thoſe reſolutions before that light was ſtruck out, and it was not brought into practice amongſt conveyancers till the time of the uſurpation, when, probably, the providing

Garth v. Cotton. viding againſt forfeitures for what was then called treaſon, and delinquency, was an additional motive toit.

Let us ſee, then, what were the claims, and defects which wanted to be filled up and remedied in conſequençe of thoſe two judgments.

The grand diſpute in *Chudleigh's* caſe was concerning the power of feoffees to uſes created ſince the ſtat. of 27 *H.* 8. chap. 10. to deſtroy contingent uſes by fine, or feoffment, before the contingent uſe came into being.

In order to determine this, the Judges entered into very refined, and ſpeculative reaſonings, ſome of which (I ſpeak it with reverence,) are not very eaſy to comprehend.

They all agreed, that where there is a conveyance to uſes;—to the uſe of the father for life; remainder to his firſt, and every other ſon in tail, with remainders over; in all thoſe caſes no eſtate at all is left in the feoffees, but the whole eſtate is diveſted, and drawn out of them by the Statute of Uſes.

But then came the queſtion reſpecting the contingent uſes to the ſons not *in eſſe*. On the one ſide, though they admitted there was no eſtate left in the feoffees, yet they ſaid there was a *ſcintilla juris*, a power of entry to preſerve the contingent uſes, if by reaſon of diſſeiſin, or diſturbance of the eſtate, there ſhould be occaſion: for, ſay they, no uſe can be executed by the ſtatute, unleſs there be a perſon ſeiſed to the uſe, and alſo a *ceſtui que* uſe. And if any diſſeiſin, or diſturbance of the eſtate ſhould happen, the right to the uſe cannot be executed within the ſtatute; therefore, leſt theſe contingent uſes ſhould be deſtroyed, and not executed,

executed, there muſt, by conſtruction of the ſtatute, be ſuch a power of entry left in the feoffees, and their heirs. *Garth v. Cotton.*

This was the opinion of the greateſt part of the Judges.

Others of the Judges were of opinion, that there was not only no eſtate left in the feoffees, but no power, or right to enter, nor any thing to do with the land; but that they were at firſt only conduit pipes, and the eſtate that was in them, was by the ſtatute wholly transferred to ſerve the uſes which were *in eſſe* with a pregnancy and proſpect to the contingent remainders, if they ſhould ariſe in their due time.

It muſt be obſerved, that one thing which weighed much with the majority of the Judges to be of opinion for leaving a right of entry in the feoffees to preſerve the contingent uſes, was their fear of perpetuities, and of having contingent eſtates by way of uſe in perſons not *in eſſe*, if they ſhould not be deſtroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preſerve the contingent uſes, ſo it put it into their power to deſtroy them, if they pleaſed.

The reaſon of which was, that at that time the law was not ſettled that the deſtruction of the particular eſtate by the feoffment, or conveyance of the *ceſtui que uſe* for life, before the contingent remainders became veſted, was a deſtruction of the contingent remainders: but afterwards came *Archer*'s caſe, in which caſe this point was ſolemnly ſettled, and they were relieved from their apprehenſions: for though *Archer*'s caſe is placed in the reports before *Chudleigh*'s caſe, it was not determined until ſome years afterwards.

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The cleareſt ſummary of the reaſoning in thoſe caſes is ſtated by Mr. *Poleſen* in his argument of the caſe of *Hales* againſt *Riſley*, in *Pollexfen*, 385, from whence I have taken it.

From this deduction you will ſee what were the chaſms, and defects to be ſupplied.

Here was then underſtood to be a power in the general feoffees to uſes either to preſerve, or deſtroy thoſe uſes *ad libitum*, and here was a power in the *ceſtui que* uſe for life to deſtroy them.

How were thoſe defects to be ſupplied and filled up? By veſting a limitation in certain truſtees *eo nomine*, upon an expreſs truſt to ſupport them. But how to ſupport them? By preſerving the whole inheritance to come entire to the *ceſtui que uſe* in contingency, in like manner as truſtees to uſes ought to do before the Statute of Uſes, when they were but truſts to be executed in this Court. And as things then ſtood, ſuch truſtees having the whole legal eſtate, might and ought to preſerve the entire inheritance, whether conſiſting of the lands, mines, or timber, for the benefit of all the *ceſtui que* truſts in remainder, either veſted, or contingent.

Secondly.—Conſider, in the next place, what ſuch truſtees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in queſtion, whether upon ſuch a limitation to truſtees after a prior limitation for life, they took any eſtate at all in the land, or only a right of entry on the forfeiture, or ſurrender of the firſt tenant for life, by reaſon, that the limitation being only during his life, could not commence, or take effect after his death.

But

But this was ſoon ſettled on the authority of *Cholmondeley's* caſe, 2 *Coke* 5 a., where it is held that if there is a leaſe to *A.* for life, remainder to another during the life of *A.*, this is a good remainder; for by poſſibility the remainder may take effect in caſe a tenant for life makes a feoffment in fee, or commits any other forfeiture; and ſo in the book 41 *E.* 3. *Fitzh.* title Waſte 83; and this is followed by the late caſe of *Duncomb* againſt *Duncomb*, Hil. 7. *Wm.* 3. *C. B.* 3 *Lev.* 437, which was one of the firſt caſes, wherein the operation of ſuch limitation to truſtees to preſerve contingent uſes, came into queſtion.

If this be ſo upon ſuch a limitation, after a prior eſtate for life, it holds much more ſtrongly when limited after a prior eſtate for years only, determinable on the life of the firſt tenant, becauſe in the laſt caſe, it comes the firſt eſtate of freehold to the truſtees, as was rightly reaſoned by Lord Chief Juſtice *Lee*, in the caſe of *Smith* and *Dormer*, and *Packhurſt*, Mich. 14 *Geo.* 2. *B. R.*

It is plain, therefore, that theſe truſtees had the immediate freehold in them, an eſtate *pur autre vie*; and at law they alone could maintain, or defend any action concerning the freehold.

If a diſſeiſin was committed, they muſt bring the aſſize, and they muſt defend in all præcipes: for the poſſeſſion of the tenant for years was, in law, their poſſeſſion: for this reaſon, they had in law an intereſt in the timber; not, indeed, to cut down or deſtroy, but in reſpect of the enjoyment by their tenant for years, and of the expectancy of it's coming into their actual poſſeſſion by the determination of his eſtate, as part of their freehold.

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Notwithſtanding all this, it is certain that they could maintain no action of waſte: the reaſon of which is, that the common law gave the prohibition of waſte only to an owner of the inheritance; and the Statute of *Glouceſter* gave the writ of waſte to the ſame perſons. But in this reſpect, ſuch truſtees are in no other condition than all other remainder men for life.

Thirdly.—Conſider, in the next place, what is the nature, and extent of their truſt in equity, and what remedies they may purſue in this Court.

And I hold it to be agreeable to natural juſtice, and in ſupport of right to conſtrue their truſt in the moſt liberal manner. In the caſe of *Manſell* againſt *Manſell*, which muſt be more particularly mentioned by and by, it was expreſsly laid down by Lord *Raymond*, as I took it from his own mouth: "It is only poſitive law, that tenant for life may deſtroy contingent remainders, and therefore it was a very conſiderable invention to create theſe truſts to preſerve them: they are the creature of the Court, and properly under it's direction, and controul."

The firſt truſt is declared to preſerve the contingent eſtates therein-after limited. How to preſerve them? To preſerve the inheritance as entire as poſſible, to go according to the ſucceſſion eſtabliſhed by the teſtator, which inheritance conſiſts of the land, timber, and mines, and cannot be preſerved entire without preſerving all three. In many eſtates the timber is the moſt valuable part, in more the mines; and the deſtruction of the one, or the exhauſting of the other, might take away, or be an alienation of the beſt part of the inheritance.

But

But it hath been objected, that this relates only to the preſervation of the legal eſtate of the uſe, and not to the timber, or mines, becauſe the eſtate of the truſtees cannot ſupport any action of waſte.

This might in many inſtances be to preſerve the ſhell, without the kernel, and brings it to the queſtion, what remedies they may, in virtue of this truſt, purſue in this Court.

Theſe truſts are equally declared to make entries, and bring actions as the caſe ſhall require. Here it is expreſsly to do all, and every ſuch lawful act, and acts by entry, or otherwiſe, as ſhall be requiſite for that purpoſe, and end.

But whether the expreſſion be the one, or the other, it comes to the ſame thing, and comprehends all remedies both in law, and equity. For the courſe of equity is a part of the conſtitution, of the law, and judicial proceedings in this kingdom.

Therefore, if after a forfeiture committed, and an entry made for that forfeiture, ſuch truſtees wanted any aſſiſtance of a Court of Equity in ſupport of their truſt, and not to break in upon the right of the tenant for life to receive the rents, and profits, they might, undoubtedly, by force of this truſt, have their remedy here.

As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to ſtay waſte, although no precedent in point is produced for it.

In the preſent caſe, they were remainder men *pur autre vie*, and immediate owners of the freehold in law. In the caſe of *Dayrell* againſt *Champneys*, 1 *Abridgment of Caſes in Equity*, 400, Trin. 1700, a remainder man for life was admitted to maintain ſuch a bill,

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without making the owner of the inheritance a party; and although it was obſerved upon that caſe by Mr. *Clarke*, that it appears by the ſtate of it in the book, that the plaintiff had the firſt remainder in tail veſted, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the truſtees could do this as remainder men of the legal eſtate *pur autre vie*, ſurely their truſt, which affects their conſcience, and, according to Lord *Raymond*'s opinion, makes them creatures of this Court, would not make their caſe the weaker here.

But the books go further, and ſay a bill may be brought for an injunction to ſtay waſte on behalf of an infant *en ventre ſa mere*. And ſo is *Muſgrave* againſt *Parry*, 2 *Vern.* 710; which is liable to much more difficulty, for that muſt be as *amicus curiæ* on the unborn child's behalf.

I, therefore, hold moſt clearly, that the truſtees might have brought ſuch a bill, and obtained an injunction to ſtay this waſte, both againſt the plaintiff's father, and the late Sir *John Hind Cotton*.

Purſue this then into its neceſſary conſequences.

Suppoſe after ſuch an injunction granted, the timber had been felled. This had been a contempt of the Court, and the contemnor muſt have ſtood committed.

Then ariſes the queſtion which Mr. Solicitor General (*a*) very properly put in his argument:—On what terms ſhould they be diſcharged? This Court could not have fined them; therefore, certainly only on the terms of making ſatisfaction. That ſatisfaction could not have been made by ſetting up the trees again, and, therefore,

(*a*) Afterwards Lord Mansfield C. J.

therefore, it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainder man in fee, for he had no right to take it: and this would have been to reward them both for their contempt, and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, Justice could not have been done. *Garth* v. *Cotton*,

Fourthly.—It comes next to be considered, how far and in what cases, such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or laches in breach of trust.

Notwithstanding the saying of Mr. *Pollexfen, arguendo* at the bar (*Poll.* 250), "that trustees to preserve contingent remainders, were never punished in equity, when they broke their trust," (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord *Harcourt*, in the case of *Pye* against *Gorges* (*a*), Mich. 1710, where he declared, that "when such trustees were appointed, whether by marriage settlement, or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts:" and he said, if there was no precedent in the case he would make one.

(*a*) Prec. Ch. 305. 1 P. Wms. 128. 2 Salk. 680. 1 Bro. P. C. 359.

Then came *Tipping* against *Pigot* (*b*), in Mich. 1711, before the same Lord Chancellor; and he adhered

(*b*) 1 Eq. Ca. Abr. 385. Gilb. Eq. Rep. 34.

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hered to the ſame doctrine; and ſaid, it would be dangerous for ſuch truſtees themſelves to make the experiment. Thus it ſtood till the great caſe of *Manſell* againſt *Manſell*, which was firſt decreed by Sir *Joſeph Jekyl*, at the Rolls, in *January* 1731, and afterwards by Lord *King*, aſſiſted by Lord *Raymond* and Lord Chief Baron *Reynolds*, 12th *December* 1732 (*a*).

(*a*) 2 P. Wms. 678. 2 Eq. Ca. Abr. 747.

Here it was firſt ſolemnly ſettled, by the concurrent opinion of all thoſe great men, that the truſtees themſelves ſhall be liable in equity to make ſatisfaction for ſuch a breach of truſt, and alſo that a voluntary alienee, or a purchaſer for a valuable conſideration, with notice of the truſt, ſhall be decreed in equity to reſtore the eſtate; and in that caſe it was decreed accordingly.

Thus it ſtands determined, that for a breach of truſt in aliening the inheritance, the truſtees are liable, and other perſons are affected by their act done in breach of this truſt.

On this I build: ſuppoſe theſe truſtees had conſented to the felling, and ſale of the timber; had joined with Mr. *Garth*, and Sir *John Hind Cotton* in the articles, and expreſsly covenanted that they would bring no bill for an injunction; would the truſtees in that caſe have been liable? Clearly ſo; for it was agreeing to alien part of the inheritance, and it plainly follows from the principle on which the Court founded itſelf in *Manſell* againſt *Manſell*: Lord *Raymond* ſaid, "it was ſtrange in natural reaſon to ſay, that where a man hath created a truſt to preſerve his eſtate, the truſtees may break that truſt, and give away the eſtate with impunity, and that there wanted

no particular precedent for it, becauſe it is founded on all the general rules of truſt.

If the truſtees had joined in the articles thus to break their truſt, would Mr. *Garth* the father, or the late Sir *John Hind Cotton*, have been affected by this expreſs act, done in breach of their truſt? This to me is alſo as clear; for then they would have had notice of this breach of truſt, and have reaped the benefits of it, which is expreſsly within the rules of *Manſell* againſt *Manſell*. And here I cannot help repeating ſome remarkable words of Lord *King*, who was not diſpoſed to amplify the juriſdiction of this Court. "If it is," ſaid his Lordſhip, "a breach of truſt, and the truſtees convey the eſtate over, a Court of Equity is not to ſit ſtill, and let others profit by the ſpoil."

This poſition is very appoſite to the preſent caſe: all the difference is, that here is no poſitive act of the truſtees, but only a *laches*, or neglect in not performing their truſt, and bringing a bill for an injunction to ſtop this waſte.

This may excuſe the truſtees, if they had no notice of the ſcheme, or attempt to ſtrip the eſtate of the timber; but how will it excuſe the others, who, as Lord *King* expreſſed it, have profited by the ſpoil? By no means.

In all caſes of alienations the alienees are not affected merely by the act of the truſtees, but by notice of the truſt: And here all parties had actual notice of the will, claim under it, and have expreſsly recited it in their articles. Therefore, in this caſe the actual notice of the truſt operates to make the laches of the truſtees affect them as much as their expreſs act would have done in the other: and it would be

ſtrange

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ſtrange to ſay that the plaintiff's and defendant's father would have been liable for the timber if the truſtees had concurred in the deſtruction, and ſale of it, but ſhall be in a better condition becauſe they did not. What is the juſtice that reſults from hence, but reſtitution? Juſt as in the caſe of an alienation with notice, the juſtice would have been a reconveyance. Indeed, it plainly follows by analogy from thence.

Suppoſe an eſtate with valuable mines in it unopened, ſettled in this manner, and the truſtees to preſerve contingent remainders had joined in an alienation with notice. Afterwards ſuch a purchaſer with notice opens the mines, and exhauſts them, putting a great ſum of money into his pocket. Then a ſon is born who is tenant in tail: the tenant for life dies, and the ſon bring a bill for a re-conveyance: if, according to the authority of *Manſell* againſt *Manſell*, the Court had decreed a re-conveyance, would the juſtice have been complete without decreeing ſatisfaction for ſo much of the inheritance as was carried off by exhauſting the mines? Clearly not. It would be a neceſſary, unavoidable conſequence of equity, that ſatisfaction muſt be made to the owner of the inheritance. And yet this is liable to the ſame objections as have been made in the preſent caſe at the bar. It was done at a time when the contingent remainder-man had neither *jus in re* nor *jus ad rem*, before he was in *rerum naturâ*; and no wrong can be done to a perſon non-exiſtent. But theſe are colourable objections only: for if equity ought to wait, and expect the veſting of the eſtate for his benefit, and reſtore him that eſtate, it ought to do it completely.

I have

I have choſen to go through the general reaſoning, (which hath, upon the matureſt conſideration, convinced me, that the plaintiff ought to be relieved in this Court), before I ſtate the objections made on the part of the defendant, the rather becauſe the cleareſt anſwer to theſe objections will ariſe from the right application of that reaſoning.

Firſt objection :—That the interpoſition, and allowance of truſtees to preſerve contingent remainders was not intended, nor has been ſuffered, to alter the legal rights of the tenants for life, and the firſt remainder-man of the inheritance veſted, either in reſpect of the timber, or other property of, or powers over, the eſtate.

Anſwer :—This objection aſſumes too much; for I have already proved, and it is demonſtrable, that the very intention of interpoſing this new invented limitation was to alter, and abridge the legal rights both of the tenant for life, and the firſt remainder-man veſted; to abridge the legal right of the former, to defeat and deſtroy the contingent uſe of the inheritance, whilſt it remains contingent, and eventual: to abridge the legal right of the latter, to deſtroy it by accepting a ſurrender of the eſtate for life ; all which are as much legal powers, as the cutting down of timber, or the opening, or digging of mines.

I admit the inſtance which was put, that if, (where there is tenant for life, or for years, ſubject to waſte,) timber is blown down by accident, or cut down by the tort of a ſtranger, or of the tenant for life alone, the owner of the firſt remainder of inheritance veſted, ſhall have the benefit of it ; ſo was the caſe of the timber blown down on the late Duke of *Newcaſtle's*

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(a) and 2 Eq. Ca. Abr. 589.

caſtle's eſtate, and the caſe of *Whitfield* againſt *Bewit*, 2 *P. Wms.* 240 (*a*); but the aſcertaining of the ground of theſe reſolutions is ſufficient to diſtinguiſh them from the preſent caſe.

The common law doth not, nor can conſider contingent uſes as having exiſtence till they happen: therefore, according to *Lewis Bowles*'s caſe, 11 *Co.* 79, and *Udall* againſt *Udall*, *Alleyn* 81, an eſtate in contingency is as no eſtate till the contingency happens. And when the trees are ſevered, the property muſt veſt immediately in ſomebody, and that can only be in the firſt remainder-man of inheritance veſted: and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the caſes put of trees fallen by accident, or merely by the wrongful act of a ſtranger, or of the tenant for life, no ground of equity to take it from him.

But here comes in the force, and operation of the colluſion in this caſe. This deſtruction being made by contrivance, and colluſion with the remainder-man, and affecting his conſcience, obliges this Court to purſue it's known maxims in laying hold of it either by reſtraining the act before it be completed, or decreeing ſatisfaction for it afterwards. For, in all caſes where a legal right is acquired, or exerciſed by fraud, or colluſion, contrary to conſcience, it is the office of this Court to enjoin it, or decree a compenſation.

Second objection:—That the relief ſought by the bill is contrary to all the rules of law, which allows no remedy for waſte to any perſon, who hath not an immediate reverſion, or remainder of inheritance veſted at the time of the waſte committed.

Anſwer:—

Anſwer :—This is true in general, though it admits of ſome exceptions even at common law. But if it were true at common law in the latitude with which it was laid down, it would not govern this caſe, which depends upon principles of equity ariſing from the colluſion, and covin between the tenant for years, and the remote remainder-man, which is an eſtabliſhed ground of relief in this Court, even beyond, and ſometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as juſtice will admit, to the rule *equitas ſequitur legem*, I will endeavour to ſhew how far the opinion I have given coincides with, and is ſupported by, the reaſon of ſome caſes concerning waſte.

It is clear, that when there is a tenant for life, with remainder over in fee, or tail, and tenant for life commits waſte, the remainder-man in fee, or in tail can have no action of waſte. The reaſon is, becauſe the plaintiff in the action muſt recover the place waſted, and that would be an injuſtice to the remainder for life, which is not forfeited; and if it ſhould be recovered by the owner of the inheritance (being under a limitation of the party), it would never go back again.

But notwithſtanding that, he may have another action, of trover for the trees, and therein recover ſatisfaction for the wrong done to the inheritance; nay, in caſe the remainder-man for life dies, living the remainder man of the inheritance, he may then bring an action of waſte for the waſte done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder, or reverſion in fee, and the remainder-man,

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man, or reverſioner in fee, grants over his remainder, or reverſion to *A.* for the life of *A.*; then the tenant for life commits waſte, and afterwards the grantor of the remainder, or reverſion for life dies; this remainder-man, or reverſioner in fee, may maintain an action of waſte, though he had parted with his remainder, or reverſion for that time by his own voluntary act.

All this appears by *Paget*'s caſe, 5 *Co.* 76 *b*, and the caſe of *Udall* v. *Udall*; and I ſhall make a further uſe of it by and by.

But ſuch is the abhorrence of the common law to waſte, and deſtruction, that it hath extended it's remedies in ſome ſpecial caſes beyond the ſtrict principles on which they were originally founded: and therefore, though it be requiſite in general that the inheritance ſhould be veſted in the plaintiff at the time of the waſte done, elſe he cannot lay it to his diſheriſon: yet, if the eſtate were out of him by wrong, and then come into him again, he ſhall maintain the action of waſte. Thus, if leſſee for life make a feoffment in fee upon condition, the feoffee does waſte, and afterwards breaks the condition, and the leſſee for life enters for the breach, though the reverſioner had nothing in the reverſion at the time of the waſte done; yet, as it was out off by him by tort, when it is reveſted, he ſhall have this remedy. *Co. Litt.* 356 *a.*

But there is another caſe at law, the reaſon of which ſeems to me to be more analogous to the preſent caſe: as that of a biſhop, after the reſtitution of temporalities to him and his ſucceſſors in right of his church. When he dies during the vacancy, the right is in the King; and when a new biſhop is inveſted in the temporalties, the fee is in him. Suppoſe then a tenant for

life, or for years, by demiſe of the predeceſſor, commits waſte during the vacancy; the ſucceſſor ſhall have the action for this waſte, though he had nothing at all in the land at the time the waſte was done. *Co. Litt.* 356. *Fitzherberts, N. Br.* 112.

I ſhall be told, perhaps, that that is by particular ſtatute, and therefore is no proof of the reaſon of the common law, and that the ſtatute of *Marlb.* ch. in 29. againſt depredations upon the poſſeſſions of eccleſiaſtical perſons, gave this remedy; and for this ſome countenance may be drawn from what *Fitzherbert* ſays, in the place cited.

But I beg leave to deny this to be law, and to hold that that ſtatute doth not include biſhops, or their poſſeſſions; and of this opinion is Lord *Coke* in his reading on the ſtatute of *Marlb.* 2d *Inſt.* 151. his words are, "This act extendeth only to abbots, priors, and other prelates, that be religious, and regular, and not to biſhops and other eccleſiaſtical perſons being ſecular; for in the ſecond clauſe of this act, *hujuſmodi religioſorum* is mentioned for the diſtinction between religious, and ſecular; and the reaſon of this diverſity is, that the abbots, and priors, and other religious perſons are dead perſons in law, and have capacity to have lands and goods only for the uſe, and benefit of the houſe, and cannot make any teſtament; and therefore the church, or religious houſe is holden always one; in reſpect whereof, the ſucceeding abbot ſhall have an aſſize for diſſeiſin done in the life time of his predeceſſor; and an action of waſte for waſte done in his predeceſſor's time; but ſo ſhall not a biſhop, dean, archdeacon, or the like, who are eccleſiaſtical perſons ſecular,

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ſecular, becauſe the church by their death hath an alteration, and is not always one."

That the opinion of Lord *Coke* was, that the action is not founded on the ſtatute of *Marlb.* is clear by other caſes; for if biſhops were within the ſtatute, then they as well as abbots might have an action of waſte for waſte done, not in time of vacancy, but in their predeceſſor's time, which as to eccleſiaſtical perſons regular, is clearly within the ſtatute; but it hath been ſettled that they cannot; 39 *Edw.* 3. 15. 2 *Henry* 4. 2. 2 *Rolls Abridg.* 8. 24. *Pla.* 3, 4, 5, 6, 7. From hence I infer, that this remedy was given not by particular ſtatute, but by the policy of the law, which would not permit an eſtate, which it allowed to be created, and whilſt it was in *gremio legis*, as it were, to be deſtroyed, or ſtript, without giving a remedy to puniſh it, though by an extenſion of it's common principles.

But ſtill I muſt reſort back to this, that if there was not ſo much countenance from the reaſon of ſome caſes at the common law for this opinion, yet that would not govern this caſe, which depends on principles of equity; and equity hath always gone further to reſtrain waſte, and deſtruction, than the common law hath done.

Therefore the caſe already put, of an intermediate remainder for life, though the law allows no action of waſte, this Court ſuſtains a bill for an injunction, and this *ab antiquo*, according to the caſe in *Moore*, 554; where Lord *Elleſmere* ſays, he had ſeen a precedent for it, ſo long ago as in the reign of *Richard* the 2d. 1ſt *Rolls Abridg.* 377. 1 *Vern.* 23. and many caſes in practice.

And

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And although the tenant in tail, after poſſibility of iſſue extinct, is at law diſpuniſhable for waſte, by reaſon of the inheritance, which was once in him, yet Lord Chancellor *Nottingham* was clearly of opinion, to grant an injunction, to reſtrain a tenant in tail, from committing waſte in timber, which grew for the ornament of a manſion-houſe, *Abrahall* v. *Bubb*. 2 *Freeman*, 53. and 2 *Shower*, 69 (*a*). In the ſame book there is the like caſe before Sir *John Trevor*, M. R. 2 *Freeman* 278. *Hilary* 1704, and this hath been followed ſince by ſeveral caſes of tenant for life without impeachment of waſte generally, who have attempted to pull down a manſion-houſe, or to cut down timber growing for ſhelter, or ornament of the manſion-houſe.

(*a*) and 2 Eq. Ca. Abr. 757.

But this Court hath gone ſtill further, and in the caſe of *Abrahall* v. *Bubb*, Lord *Nottingham* cites the caſe of a Lady *Evelyn*, where there was tenant for life, remainder to the firſt ſon for life without impeachment of waſte, with remainders over, and the firſt ſon by leave of the leſſee of the tenant for life, came upon the land, and felled timber, which was not under the deſcription of trees growing for ſhelter, or ornament; and this Court granted an injunction againſt him, though no action whatſoever could be maintained at law: And upon the ſame ground, I did the like in the caſe of *Fleming* againſt the late Biſhop of *Carliſle*, and others: there the biſhop was tenant for life, remainder to his eldeſt ſon for life, without impeachment of waſte, with remainder over in fee; the eldeſt ſon, by permiſſion of the biſhop, entered, and began to cut down the timber, and the reverſioner in fee, brought a bill for an injunction, and

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I granted it, becauſe he was not to be allowed to exerciſe his power of doing waſte by anticipation; and before the eſtate, to which this privilege was annexed, came into poſſeſſion; and this in reaſon comes near to the caſe of the late Sir *John Hind Cotton*'s bringing himſelf by colluſion, into poſſeſſion of the timber, before his time.

(*a*) 3 Atk. 209. 2 Eq. Ca. Abr. 528.

The caſe of *Robinſon* againſt *Lytton* (*a*), went ſtill further than the common law: That cauſe was heard in this Court, the 12th of *Dec.* 1744, there was a deviſe to the defendant and his heirs, and if he ſhould die before his age of 21 years, leaving no iſſue, then to the teſtator's firſt, &c. daughters in tail; remainder to the teſtator's own right heirs; but if the defendant ſhould live to attain the age of twenty-one years, then the eſtate ſhould be ſold, and the money to be applied for the benefit of the teſtator's daughters. The defendant, being under the age of twenty-one years, began to commit waſte, and the daughters brought their bill in this caſe; and though the defendant had the inheritance in him in point of law at the time, yet by reaſon of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cauſe after it's being fully argued, made that injunction perpetual.

Third objection: That ſuppoſe a bill might have been maintained by the truſtees to ſupport the contingent remainders to ſtay this waſte, before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the juriſdiction of this Court to decree an account of the value of the timber, is only incident, and concomitant to the juriſdiction of granting an injunction.

Anſwer:—It is true, that the general run of the cafes, is of bills for an injunction, becauſe that is a preventive ſuit, and the moſt remedial to the party; but that affords no concluſive argument that a bill for ſuch an account cannot be maintained, without praying an injunction. *Garth* v. *Cotton.*

In ſupport of this notion, only one caſe was cited, Jeſus College againſt *Bloome* (*a*), which was before me, *November* 13, 1745: The leſſee of the college had during his leaſe, cut down ſome trees, and taken away ſome ſtones, and materials of the premiſes, and converted them to his own uſe; the term was expired, and a new leaſe granted to a ſtranger, and the College brought their bill for an account, and ſatisfaction of the waſte. At the hearing of the cauſe, I doubted, (amongſt other things,) whether ſuch a bill in equity was maintainable, without praying an injunction to ſtay the waſte, and it ſtood over to another day, and produce precedents; none were produced, and the bill was diſmiſſed without coſts; but the point was not abſolutely determined, nor was that the only ground of the diſmiſſion, but I was of opinion, that at the utmoſt, it was in the diſcretion of the Court, and if the College had a right, they might clearly bring an action of trover at common law, and it being a matter of ſmall value, I did not think fit to countenance ſuch bills in this Court, after the leaſe expired. (*a*) 3 Atk. 262.

This is widely different from the preſent caſe, in all it's circumſtances, and particularly, that it is admitted, that the plaintiff here, though greatly damnified, can have no remedy at law, which is a ſubſtantial difference.

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Fourth objection:—But it was objected further, that if ſuch a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be ſecured, and laid out in land for the benefit of the contingent-remainder man: and this could not be done even upon a bill by truſtees to preſerve contingent remainders before the waſte completed, and for this the caſe of *Whitfield* againſt *Bewick*, was relied on.

Anſwer:—This objection hath been already anſwered in the courſe of my argument, and to that I will refer without repeating it. The ſound diſtinction between this caſe, and that of *Whitfield* and *Bewick*, is the colluſion, and covin between the tenant for years, and the remote remainder-man in fee; whereas in that caſe the remainder-man in fee was entirely innocent, and had done nothing contrary to conſcience to come at his legal property in the timber when ſevered; but it was ſolely the tortious act of the tenant for life; and I think I have proved that in ſome caſes of deſtruction of contingent remainders, or alienations of part of the inheritance to the prejudice of the contingent remainder-man, ſuch an account, and compenſation muſt be decreed in order to attain adequate juſtice.

On this I rely for an anſwer to that objection.

Fifth objection:—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Anſwer:—But though there is length of time in the caſe, no Statute of Limitations ſtands in the way, nor is there any laches to be imputed to the plaintiff.

It

It is true the articles were entered into in 1714, and the timber was felled ſoon after; but the plaintiff was not born till *May* 1724: his father lived till 1727, and he did not attain his age of twenty-one years till *May* 1745; and this bill was brought in *May* 1748, within three years after his coming of age.

As to the inconvenience objected to ariſe from this length of time, how is that inconvenience greater than the common law's allowing an action of waſte to be brought by a remainder-man in fee after the death of a meſne remainder-man for life, for waſte done in his life-time? That life may have laſted forty, fifty, or ſixty years afterwards, and yet this the law allows. Beſides, in this caſe the plaintiff ſubmits to accept the value on the foot of the defendant's anſwer, which avoids the difficulty of an account.

Sixth objection:—Another objection hath occurred to me in conſidering this caſe, which was not mentioned at the bar; and that is, that by ſuffering a recovery in 1715, the plaintiff hath altered the ſtate of the remainder, which was in him by the will, and gained a new uſe. That this might have been a bar to a proper action of waſte at law for waſte done precedent; and, by parity of reaſon, ought to take away his remedy in this Court.

Anſwer:—This objection, though it may ſtrike at firſt, yet receives a clear anſwer.

I admit that in *Co. Litt.* 53 *b.*, Lord *Coke* lays it down, that after waſte done, there is a ſpecial regard to be had to the continuance of the reverſion in the ſame ſtate, that it was at the time of the waſte done; for, if after the waſte done, the reverſioner granteth it over, though he taketh back the whole eſtate, yet is

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the waſte diſpuniſhable. So, if *A.* grant the reverſion to the uſe of himſelf, and his wife, and of his heirs, yet the waſte is diſpuniſhable, and ſo of the like; becauſe the eſtate of the reverſion continueth not, but is altered, and conſequently the action of waſte for waſte done before, which conſiſts in privity, is gone.

This is undoubtedly law; but the difference is, here is no uſe, or new eſtate created. The uſe of this recovery is declared only to the plaintiff himſelf, and his heirs, whereby his eſtate tail is turned into an eſtate in fee, which, in Lord *Derwentwater*'s caſe before the Judges, and Delegates, Hil. 6 *Geo.* 1. was ſolemnly determined to be the ſame uſe, and the ſame fee, only delivered from the fetters, and reſtraint laid upon it by the ſtatute *de donis*; and this was agreeable to the reſolution of the caſe of *Abbot* againſt *Burton*, 2 *Salk.* 590 (*a*). Trin. 7 *Ann. C. B.*, and to the caſe of *Martin ex dim. Tregonwell* againſt *Strachan* adjudged in *B. R.* Hil. 16 *Geo.* 2., and affirmed in the Houſe of Lords in *February* 1743 (*b*).

(*a*) and 11 Mod. 181. Com. Rep. 160.

(*b*) 2 Stra. 1179. 1 Wils. 2 66. 4 Bro. P. C. 486.

But I go further ſtill, and hold that even in caſes where the ſtate of the reverſion would be ſo altered by the act of the reverſioner as to preclude his proper action of waſte, yet ſtill his property in the timber ſevered before would remain, and he might maintain trover for it, which is ſufficient to take off the force of this objection as applied to the preſent caſe.

Seventh objection:—I ſhall mention but one objection more, and that ariſes recently from the preſent ſtate of the cauſe, as it comes before the Court upon a bill of revivor againſt the repreſentative of Sir *John Hind Cotton* the original defendant. That an action of waſte

waſte dies with the perſon, and if the plaintiff had in other reſpects been in a condition to maintain waſte againſt Sir *John Hind Cotton*, the party to the articles, it had been gone by his death: That the law is the ſame as to the action of trover: *pari ratione* he hath loſt his equitable remedy for the waſte.

Anſwer:—I admit the law to be clear, that an action of waſte dies with the perſon; and I alſo admit, that I cannot find any authority, or precedent for maintaining an action of trover againſt an executor upon a converſion by the teſtator in his life-time. Though as to this point I give no opinion; for thus much is certain, that an action of trover will lie for an executor upon a converſion by the defendant in the life-time of the plaintiff's teſtator, for which there are many authorities; and it ſeems difficult to be reconciled to reaſon, and juſtice, that theſe remedies ſhould not be mutual even at the common law.

However, I will admit for argument's ſake, that the action of trover for the timber was, as well as the ſtrict action of waſte would have been gone at the common law; but notwithſtanding that, I am of opinion that the plaintiff is entitled to the ſame relief in this Court.

There have been ſeveral determinations in this Court, where, by force of the rule, *actio perſonalis moritur cum perſonâ*, the remedy at law hath been extinguiſhed, yet equity hath given the like ſatiſfaction.

It is well known that at common law, before the ſtatute of 30 *Car.* 2. *Cha.* 7, and 4 & 5 *Wm.* & *Ma. Ch.* 24, *ſect.* 12, no action, or remedy could be had againſt the executor of an executor for a devaſtavit

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committed by the firſt executor of the goods of the original teſtator. But notwithſtanding this, equity did not ſcruple to get the better of this artificial maxim, and decreed an account, and ſatisfaction againſt the repreſentatives of ſuch a waſting executor, out of his aſſets.

This is laid down as a rule in equity by Lord Chancellor *Nottingham*, in the caſe of *Price* againſt *Morgan*, 2 *Ch. Cas.* fol. 215.

His words are, "Although, by the common law, when the executor waſtes, his executor ſhall not be liable, becauſe it is a perſonal wrong, it is otherwiſe here, and the common law will come to it at laſt; and therefore whatever eſtate of the waſting executor is come to his repreſentative, which his teſtator waſted, the perſonal eſtate of ſuch waſting executor in the hands of his executor, ſhall anſwer."

When Lord *Nottingham* ſaid, the common law would come to it at laſt, he was a true prophet; for this caſe was decided in the 28th of *Car.* 2.; and the law was altered by act of parliament in the 30th of *Car.* 2.

(*a*) and 1 Eq. Ca. Abr. 32.

1 *Ch. Cas.* 121 (*a*), *Eton* College againſt *Beauchamp* and *Biggs:* The Provoſt and Fellows of *Eton* were poſſeſſed of a rent, or penſion of 1 *l.* 14 *s. per ann.* granted by King *Henry* VI. to that College, iſſuing out of the lands; The defendant *Biggs* was executor of the tenant: And the bill was brought for a ſatisfaction of the arrears of rent incurred in his teſtator's life-time, and ſuggeſted that the College did not know the lands out of which the rents were iſſuable, and ſo could not diſtrain; and though the perſon of the terre-tenant was not chargeable with the rent at law, but only the land by

by way of diſtreſs: yet, foraſmuch as the teſtatrix held the land, and did not pay the rent, it was ſaid, that thereby the teſtatrix's perſonal eſtate was augmented, and therefore the Maſter of the Rolls, Sir *Harbottle Grimſtone*, decreed the executor to pay the arrears, as far as he had aſſets of the teſtatrix.

In 2 *Mod.* 293. *Anon. Error.* Hil. 29. *Car.* 2. in the Exchequer Chamber, before the Lord Chancellor, and Lord Treaſurer, aſſiſted by the two Chief Juſtices. The caſe was, the plaintiff had declared againſt the defendant as executor of *Edward Nichols*, who was executor of the debtor: The defendant pleaded, that the ſaid debtor died inteſtate, and adminiſtration of his goods was granted to a ſtranger *abſque hoc*, that *Edward Nicholls* was ever executor, but did not ſay by his plea, or ever adminiſtered as executor, for in truth he was executor *de ſon tort*: The plaintiff replied, that before the adminiſtration granted to the ſtranger, *Edward Nicholls* poſſeſſed himſelf of divers goods of the debtor, and made the defendant executor, and died: And to this replication the defendant demurred. Judgment was given for the plaintiff in the Court of Exchequer, but reverſed in the Exchequer Chamber: for an executor of an executor *de ſon tort* is not liable at law; though the Lord Chancellor *Nottingham* ſaid he would help the plaintiff in equity.

Theſe authorities would be ſufficient to eſtabliſh the point I am now upon. But I go further, and hold, that in all caſes of fraud the remedy doth not die with the perſon; but the ſame relief ſhall be had againſt an executor out of the aſſets of his teſtator, as ought to have

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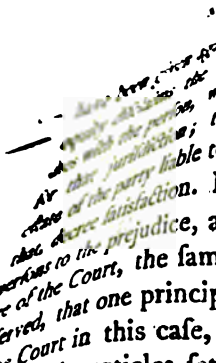

the testator himself. For, as that a personal remedy wherever the demand is proper this Court will follow the ble to that demand, and out of on. Now, collusion between two ce, and loss of a third, is, in the the same as a fraud; and you have one principal ground of the judgment in this case, is collusion appearing upon the articles set forth in the answer.

I have now gone through the arguments, and objections arising upon the particular case, and the authorities of law, and equity.

One general argument remains, of which the counsel on both sides did in their turns, endeavour to avail themselves; I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants, were urged, the inconveniences that would arise, from making such a precedent, which would tend to lock up the timber of the kingdom, from coming to market; would create questions between possessors of estates, and contingent remainder-men springing up at a great length of time, and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down, that a contingent remainder-man cannot possibly have any remedy in such a case; I say, let them be compared, and the former will

will weigh nothing, in the oppoſite ſcale againſt the latter.

Thus far the law allows ſettlements of eſtates to go, and no further, and it hath been found to be a convenient medium between perpetuities, and too flux, and unſtable a condition of things; moſt of the family eſtates in this kingdom, are under ſuch ſettlements, and it frequently happens, that the firſt remainder-man of the inheritance veſted, is a remote relation; remote in blood; and remote in the proſpect of ſucceſſion, perhaps after fifty years contingent limitation of that inheritance.

If what has been done in this caſe, ſhould be determined to be done *impunè*, without any poſſible recompence in a Court of equity, what havock would it make, and what a licence would be proclaimed! Every remainder-man in fee, though after ever ſo many contingent limitations, might by colluſion with the tenant for life, or years in poſſeſſion, or perhaps of his under-tenant, ſtrip the eſtate, and convert the value of it to their own uſe: ſuppoſe an eſtate in the great timber countries of *England*, in the north, or in *Cornwall*, where the principal value may conſiſt in timber, or mines, all that value may be exhauſted and diſſipated before a firſt ſon is born, and when he is born, he may find nothing but the ſhell of what was intended for a laſting ſupport of a family of honour.

It will be no anſwer to this, to ſay, the truſtees to preſerve contingent remainders may bring a bill for an injunction to ſtop this miſchief; the miſchief may be completely executed, before they know of it, nay poſſibly

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poſſibly before they can know, whether they are truſtees, or not; for it moſt frequently happens, that truſtees to preſerve contingent uſes, are inſerted in ſettlements, and wills, without their being made acquainted with it.

From hence it is evident, that this will be but a ſhadow of a remedy, unleſs the Court goes further, and builds a more adequate relief upon the ſame principles.

And here, I cannot help adding, that this becomes of the greater importance, from the practice, and abuſes of the times, into which we are fallen: when ſo many new inventions, and contrivances daily ſhew themſelves in Courts of Juſtice, to ſupply, or to tempt, or to impoſe upon the extravagance, and neceſſities of tenants for life, to the deſtruction of their families.

Theſe conſiderations bring to my mind the laſt reaſoning of the Judges, in *Fermer's* caſe, 3 Co. 79. and with that I will conclude.

That reſolution was quite new, and of the firſt impreſſion, and was contrary to the letter of the ſtatute of the 4th of *Henry* 7th, chap. 24. but the book ſays, "Laſtly the Judges in this reſolution, did greatly reſpect the general miſchief, which would enſue, if ſuch fines, levied by practice, and covin of perſons who had particular intereſts, ſhould bar thoſe who had the inheritance."

The reſult of the whole is: I muſt decree ſatisfaction to the plaintiff, for what the late Sir *John Hind Cotton*, received, out of his affets; and if the original limitations had been ſtill ſubſiſting, I muſt have directed this money, to have been laid out in lands, to the ſame uſes;

uſes; but as theſe are now barred, and the plaintiff is tenant in fee, the money is his own. *Garth* v. *Cotton.*

In this, the queſtion of intereſt is material, and I have conſidered it: The principal money is reckoned by the anſwer at 1000*l.*; the cauſe being heard on bill, and anſwer, and the plaintiff having at the bar, prayed intereſt from the time it was received in reſpect of the poſſible growth of timber.

But there being no proof, it does not appear, what was the condition of the timber; whether by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhauſted in repairs, or deſtroyed by tempeſts, or accidents; or what young timber may have grown up in its place in the mean time: From theſe conſiderations, and as this is a new caſe, I do not think fit to give intereſt further back than the filing of the bill.

Ex parte *Ingman.*

Hil. 1753.

Curſitor to make out an original in treſpaſs, *quare clauſum fregit*, and the party not to apply to the Filazer.

AN application that the Curſitor of *Middleſex* make out an original in treſpaſs, *quare clauſum fregit*; the Curſitor objected he was not warranted ſo to do, unleſs the cauſe of action were ſhewn, and if the real cauſe of action were in debt, or on the caſe, they ought to apply to the Filazer, and inſiſted the order of Lord *Clarendon*, directs an affidavit to be produced to the Curſitor; and further that it was of conſequence to the King's fines, which ought to be paid in proportion to the demands.

To this the party's counſel, alleged, he was entitled to an original this way; and further, that the debtor had

Ex parte *Ingman.*

had abſconded, and therefore he did not intend to proceed againſt his perſon, but againſt his goods, by way of *pone* and *diſtringas*; and cited *Byas* v. *Lyel* in Mr. *Barnes*'s book.

On this application, the Maſter of the Rolls, who aſſiſted the Lord Chancellor, was of opinion, that as the writ is demandable, *ex debito juſtitiæ*, and made out of courſe, it ſeemed to lie on the Curſitor, to ſhew his reaſon for refuſing it, whoſe reaſon was, that this method of coming to the Curſitor in the firſt inſtance, was not the uſual practice, for that he ought to take a *capias* from the Filazer.

In anſwer to this, his Honour was of opinion, that if the plaintiff choſe to take out an original, firſt, to warrant his ſubſequent proceedings, and not to proceed by way of *capias*, his taking out a *capias* in the firſt place, was unneceſſary, and a waiver of the *pone*, and *diſtringas*, and was therefore of opinion, this was no reaſon for the Curſitor's refuſing the writ.

Another reaſon given by the Curſitor was, that it was contrary to the ſtatute for preventing frivolous, and vexatious arreſts; but to this it was ſufficient to ſay, that the office of the great ſeal in inſtances of legal writs, was conſiderable as *officina brevium*; and that ſuch writs were to iſſue on demand of the party, and that they were conſiderable in the Court in which they were returnable, and that the truſt was to that Court, which held this method of proceeding regular; and the party takes it at his peril, and therefore there was no reaſon, why the Court ſhould not iſſue it.

Lord Chancellor was of opinion with his Honour, and cited *Raſtal*, title in *Treſpaſs*, 669. as a clear precedent, to ſhew that at common law in treſpaſs *vi et armis*,

armis, the plaintiff hath his election, to proceed either by *capias* againſt the perſon, or by *pone*, and *diſtringas* againſt the goods of the defendant; and declared, that in this reſpect, Lord *Clarendon's* order had not been obſerved, and was diſuſed; and that the act of parliament againſt frivolous arreſts, had not taken away the method of proceeding, by *pone*, and *diſtringas*, and ordered the Curſitor to make out the writ. Ex parte *Ingman.*

Macnamara v. *Macquire.*

8 Feb. 1753.

COMMON injunctions do not ſtay proceedings in the Spiritual Court, but are to be moved ſpecially, as was ſaid by Lord *Hardwicke* C. to be laid down in 1 *P. Wms.* 301. and that the ſame rule holds in reſpect to proceedings in the Admiralty.

Loubier v. *Croſs.*

(Reg. Lib. B. fol. 228.)

19 April 1753. Vid. Moore v. Moore, ſupr. 66.

A DEFENDANT in the original cauſe had filed a ſupplemental bill in nature of a bill of review, without leave, and without making the uſual depoſit; the application was to ſet the miſtake right, which the Court ordered, by giving the defendant leave to make the depoſit, and to have it conſidered as made before the bill was filed.

Stevens

1 May, 1753. At the Rolls, Sir John Strange, M. R.

Stevens v. *Avery.*

A party reſtrained from paying any part of the bill of fees, &c. due to her ſolicitor, until the clerk in court, employed by him in the cauſe, was fully paid his bill.

THE defendant *Avery* employed Mr. *Gandy*, as the ſolicitor in the cauſe, who employed Mr. *Cholwich* as the clerk in court, for the ſaid defendant in this cauſe; and was upon account, indebted to the ſaid Mr. *Cholwich*; the cauſe having been heard, Mr. *Cholwich* delivered in a bill of his fees, and diſburſments.

Gandy afterwards dying inſolvent, and *Joel* his widow, having obtained adminiſtration to him, Mr. *Cholwich* applied this day, and obtained an order, to reſtrain the defendant *Avery* from paying to the ſaid Mrs. *Gandy*, any part of the fees, and diſburſments, due to Mr. *Cholwich*; and Mrs. *Gandy*, from receiving the ſame, until Mr. *Cholwich*, ſhould be fully paid his bill of fees, and diſburſments (*a*).

This was moved ſpecially upon notice.

(*a*) In Jeſſe v. Hill, 19 March, 1753, ſimilar order made by Sir Thomas Clarke M. R. and in Chaloner v. Chaloner, 3 April, 1759, and in Harris v. Chevely, 1775, by Lord Bathurſt C. Vid. alſo Ballard v. Hobbs, infra.

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15 May 1752 So in Gibbon v. Gibbon, 23 June, 1757, and Plunket v. Duke of Bedford, 24 April, 1759.

Warburton v. *Hankey.*

ANSWER taken off the file, the ſame reſpecting the bartering for boroughs.

Ellis

Ellis v. *Smith*, et è contra.

18 May 1753.
1 Ves. jun. 12
S. C.

A will eſtabliſhed as to land, acknowledged only by the teſtator in the preſence of three witneſſes; and held alſo to be a revocation of a former will of land.

THE bill in the firſt cauſe, was filed by the reſiduary deviſee, and legatee, in the will of Captain *William Ellis*, to eſtabliſh his will, dated the 11th of *February* 1739, and to carry the truſts into execution; to have his real eſtate ſold, and the purchaſe money applied in aid of the perſonal eſtate, and the ſurplus paid to the plaintiff.

The bill ſtates, that the ſaid *William Ellis*, being ſeiſed of manors, lands, and hereditaments, on the 11th day of *February* 1739, duly made his will, as by law is required, for paſſing real eſtates, and thereby directed his debts to be paid, and charged, and made ſubject, all his real eſtates, with the payment thereof; and deviſed, and bequeathed, the reſidue of his real and perſonal eſtate to the plaintiff *William Ellis*, and appointed him ſole executor.

The teſtator afterwards went to *New York*, and as the defendant alledged, made another will there, all of his own writing, dated the 6th day of *Aug.* 1743, in part as follows: "I *William Ellis*, of the *Weſt Riding*, *Yorkſhire*, Eſq. do to avoid controverſies after my deceaſe, make this my laſt will, and teſtament, revoking all others that have been made by me to the date hereof;" the teſtator then gives ſeveral pecuniary legacies, adding, "my debts and funeral expences to be paid by my executor *William Ellis*;" the plaintiff in the firſt cauſe.

This will was proved at *New York*.

The defendants, the heirs at law, by their anſwer, inſiſt, that the will of the 4th of *February* 1739, was revoked by the will of the 6th of *Auguſt* 1743; and by

Ellis v. *Smith*, et è contra.

their croſs bill, pray an account of the perſonal eſtate, and the rents, and profits of the real eſtate, and to have ſufficient of the real eſtate ſold, to make up the deficiency of the perſonal eſtate, and the ſurplus declared to belong to them as co-heirs.

William Ellis, the reſiduary deviſee, by his anſwer to the croſs bill; admitted the teſtator made ſuch will of the 6th of *Auguſt* 1743, as before ſtated, but inſiſted, that although the ſaid will might be good, and valid, as to the perſonal eſtate, yet that the ſame was not duly executed, ſo as to paſs lands of inheritance; and conſequently did not revoke the firſt will, for that although it might appear on the face of the will, that three perſons ſubſcribed their names as witneſſes thereto, yet the teſtator did not ſign his name, or ſet his ſeal to the ſaid will, in the preſence of all, or any of the perſons, who appeared to have ſubſcribed their names as witneſſes thereto.

This cauſe came on to be heard the 6th of *June* 1749, before Lord *Hardwicke* C. when a caſe was directed for the Judges of the Court of King's Bench, upon the pleadings, and proofs, relating to the execution of the will of the 6th of *Auguſt* 1743; and the queſtion thereon was to be, whether the ſaid will was duly executed by the ſaid *William Ellis*, according to the ſtatute made for preventing frauds, and perjuries.

A petition for re-hearing having been preferred, theſe cauſes came on to be re-heard before his Lordſhip, aſſiſted by Sir *John Strange*, Maſter of the Rolls, Sir *John Willes*, Lord Chief Juſtice of the Court of Common Pleas, and Sir *Thomas Parker*, Lord Chief Baron of the Exchequer.

And

And on this day they ſeverally delivered their opinions. *Ellis* v. *Smith*, et è contra.

Lord Chief Baron *Parker*.—The queſtion is, whether a will brought ready ſigned and ſealed, and acknowledged by the teſtator, to be his hand-writing, in the preſence of three witneſſes, and thoſe three witneſſes, ſubſcribing their names thereto in the preſence of the teſtator, is a good will, and amounts to a revocation of the firſt.

By the fifth clauſe of the Statute of Frauds, three things are required; firſt, the will to be writing; ſecondly, to be ſubſcribed by the teſtator; thirdly, to be ſubſcribed by three witneſſes in the preſence of the teſtator.

If this had been *res integra*, I ſhould have had great doubt whether the teſtator's acknowledging his hand, had been ſufficient; but after the former determinations, I muſt conſider myſelf as bound by them.

In *Lemayne* v. *Stanley*, 1 *Levins* 3 (*a*), the caſe was this: the teſtator had not ſigned at the bottom of the will, but his will, being all of his own hand-writing, his name was in the body, and then it is to be preſumed the will was produced ready drawn.

(*a*) 1 Eq. Ca. Abr. 403, S. C. 1 Freem. 538. S. C.

In an anonymous caſe, *Skinner* 227. Lord *Jefferys* ſeemed to think, an *acknowledgment* would be within the ſtatute.

In *Peate* againſt *Ougley* (*b*), Lord C. J. *Trevor* was of the ſame opinion.

(*b*) Com. Rep. 197. 2 Eq. Ca. Abr. 761.

In *Dormer* v. *Thurland*, 2 *P. Wms.* 506. Lord *Talbot* C. ſaid, it had been determined in this Court, that where a teſtator had ſigned his will, and afterwards declared it to three witneſſes, and they ſigned in his preſence, it was a good will; and Lord *King* ſeemed

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of that opinion, in *Lee* againſt *Libo*, in *Carthew*, 35. where there was one witneſs to the will, and two to the codicil, ſo that neither was according to the ſtatute.

In *Stonehouſe* v. *Evelyn*, 3 *P. Wms.* 252. Sir *Joſeph Jekyl*, M. R. was of opinion, that the teſtator's acknowledging his hand was ſufficient; and was of the like opinion in *Smith* v. *Cawdron*, 7th *July* 1732.

(a) Supra.

In the caſes of *Grayſon* v. *Wilkinſon* (*a*), 17 *July* 1752, and *Spencer* v. *Moore*, the heir had liberty to try the wills.

But the caſes that allow of witneſſes ſubſcribing at different times, are ſtronger than the preſent, and they are *Cook* v. *Parſons*. *Prec. Ch.* 184, and *Jones* v. *Lake*. In the laſt no ſtreſs was laid on the teſtator's running his pen over his name.

And as to *Lodge* v. *Jennings*, *Rep. in Eq.* 255. out of Lord *Gilbert*'s Reports, he took the hint from what Lord Keeper *Wright* ſaid in Precedents in Chancery, where it was determined, that witneſſes might atteſt at different times.

It has been inſiſted, that the ſealing of a will in the preſence of witneſſes, is ſigning within the ſtatute; but I cannot think ſo: and in caſes where a perſon hath been authorized to ſign for the teſtator, the teſtator was unable, through diſtemper, to ſign himſelf. It is ſaid in *Lemayne* v. *Stanley*, the Judges were of opinion, that ſealing was ſigning within the ſtatute.

(b) Stra. 764.

In *Warneford* againſt *Warneford* (*b*), Lord *Raymond* ruled, ſealing a will was ſigning, within the ſtatute. But I do not think this ſo ſettled a point.

As to the queſtion, whether the ſecond will amounts to a revocation of the firſt; this depends on the

the ſixth ſection of the ſtatute; and I take it, a revocation may be by any other will, or codicil executed by the teſtator, with the ſolemnities required by the ſtatute; and in conformity with that opinion is 3 *Modern* 118. and as to *Hylton* v. *King*, 3 *Lev.* 86. where a will was ſigned by the teſtator, and a revocation written on the ſame paper, but not ſigned by the teſtator, but only ſubſcribed by four witneſſes: that was held no revocation, becauſe it was neither a will, nor codicil. *Ellis* v. *Smith*, et è contra.

And in the ſecond will, in the caſe now before the Court, there are expreſs words of revocation.

And therefore I am of opinion, that the ſecond will is executed according to the Statute of Frauds, and doth amount to a revocation.

Lord Chief Juſtice *Willes*.—If this had been a new caſe, I ſhould have prayed time to conſider, becauſe I own I am not quite ſatisfied with the opinion I am about to give; but I am overborne by the caſes, and authorities; and I am conſcious that greater miſchiefs would ariſe by my differing from the authorities than in giving that opinion.

I ſhall lay the ſecond queſtion, whether the words in the ſixth ſection of the ſtatute relate to wills of revocation, out of the caſe; for it would be abſurd to ſay, that wills amounting to a revocation ſhall be executed in one manner, and wills diſpoſing of lands ſhall be executed in another.

And on the firſt queſtion, had it been a new caſe, I ſhould have doubted; but the caſes and authorities are too ſtrong to be got over. If miſchief appear, the legiſlature may interpoſe; but it is too much for the Court.

Ellis v. *Smith*, et è contra.

In *Lee* againſt *Libb*, there were not three witneſſes to either will, or codicil. In *Lodge* againſt *Jennings* there were two ſignings, and each ſigning was a diſtinct execution, and but one witneſs could atteſt.

The caſes, where it is held that three witneſſes may atteſt at different times, are ſtronger than the preſent, and may be attended with miſchiefs. If the three witneſſes atteſt at different times, they cannot all ſee the teſtator execute.

Moreover, the three witneſſes are intended to be a check on each other: how can they be ſo if they atteſt at different times?

However, there are ſtrong authorities, and I am glad this caſe doth not go ſo far.

And as I find, upon the whole, that in favour of wills, the caſes have gone farther than the preſent, where wills have been fairly obtained, I am of opinion this will is well executed.

But I put in my claim to be of opinion, that ſealing is not ſigning, nor do I know that it has been ſo determined; and I look upon myſelf at liberty to conſider it, in caſe the point ſhould ariſe.

Lemayne v. *Stanley* is no authority for the purpoſe. That merely determined that writing the name at the beginning of a will was ſigning.

Warneford againſt *Warneford* was at *niſi prius*, and is not conſiderable as an authority, though it ought to have ſome weight.

The Maſter of the Rolls concurred in opinion, and obſerved, that ſealing identified nothing at law, and that the ſeal is often put by a ſtationer.

The Lord Chancellor obſerved, that the ſecond will was executed at *New York*, and proved there, and was not

not ſuffered to be ſent from thence, as it related to lands there, as well as to lands here; and, therefore, the queſtion could not be determined at law, and concurred with the Judges. *Ellis* v. *Smith*, et è contra.

If this had been *res integra*, his Lordſhip ſaid he ſhould have had doubts, but as it was *res judicata*, he muſt be governed by authorities; and he thought this caſe not ſo ſtrong as the caſes that had been cited.

And he was of opinion on the ſecond queſtion, that the words in the ſixth ſection of the ſtatute, "ſigned by the teſtator in the preſence of three witneſſes," refer to the words "other writing," and not to the words, "will, or codicil;" and held the will to be well executed.

Frankland v. *Frankland*.

25 May 1753.

Queſtion concerning examiner's right to take depoſitions in the country.

THE cauſe being at iſſue, the defendant prevails with the examiner's clerk to go into *Norfolk*, and to examine Sir *Andrew Fountain* as a witneſs.

The plaintiff moved this day to ſuppreſs the depoſitions for irregularity.

Lord *Hardwicke* C.—Two queſtions have ariſen:

One as to the irregularity of the proceedings:

The other, as to the intereſt of the officers of this Court.

The clerks in court copy the depoſitions taken on commiſſion; and the examiners copy depoſitions taken by them *virtute officii*.

This is an ancient queſtion. The examiners did heretofore claim to be the ſole examiners of the Court.

Frankland v. *Frankland.*

It would be inconvenient to the parties if the defendant could take a ſingle examining clerk into the country; for the clerk on one ſide might agree to go, and the clerk on the other might refuſe, and ſo loſe the opportunity of croſs-examining.

Where a witneſs is examined, the adverſe party hath a right to call on him to be croſs-examined, and to attend for that purpoſe four days.

Can this be done out of *Norfolk?*

In Lord *Nottingham's* manuſcripts, he mentions two caſes in which the examining clerks have gone out of the office to examine; *Darrel* v. *Shirley*, 20 *Eliz.*; *Roper* v. *Wiſeman*, 21 *Car.* I.; and alſo mentions, *Caſtlemain* v. *Doe*, 18 *Car.* II., and *Moſely* v. *Maynard*, 20 *Car.* II.; but holds this courſe of all others moſt dangerous, and thinks fit to reſtrain all itinerary examiners, and from the two laſt caſes had ſeen miſchiefs.

There can be no right to examine, where there is no proceſs to compel a witneſs to appear.

Parties have a right to have witneſſes examined in their preſence.

But that being impoſſible here, the method to ſupply it hath been, to examine them, either by the examiner, or by commiſſioners, and to make this examination amount to an examination in the preſence of the parties, the witneſs is firſt to be produced at the ſeat of the Clerk in Court, for the adverſe party; and a note of his name and place of abode is delivered.

If the party could carry an examining Clerk into the country, there would be no commiſſioners to examine witneſſes *de bene eſſe*; yet this was never attempted.

But

However, by conſent theſe depoſitions were read, but without prejudice to the general queſtion concerning the regularity of taking them, and the right of any officers of the Court. *Frankland* v. *Frankland.*

Weſtcomb v. *Weſtcomb.*

26 May, 1753. So in Torin v. Jervois, 19th Oct. 1750.

THE committee of the eſtate of a lunatic, appointed his guardian, to anſwer, and defend the ſuit.

Woodroffe v. *Kinaſton.*

21ſt June 1753.

ON a motion to ſuperſede, or quaſh a writ of *certiorari* iſſued out of this Court, to remove proceedings in *replevin*, in the Mayor's Court of the city of *London*, three objections were taken to the writ.

A writ of *certiorari* returnable in the Court from whence it iſſues, and it muſt be to return the record, not the tenor of the bill, in the Mayor's Court.

Firſt it was made returnable in the ſame Court, whereas it ought to have been in a court of law: Secondly, as to the length of time of the return, it being teſted the 9th of *February*, and returnable fifteen days after *Eaſter:* Thirdly, that it was not to remove the record itſelf, but only the tenor thereof.

Lord *Hardwicke* C. was of opinion, the writ was good as to it's being returnable in this Court, and as to the return thereof. But that with reſpect to the return, it ought to be ſhortened, and directed the Curſitor to prepare a writ for that purpoſe; and as to its being made to return the tenor, and not the record itſelf, his Lordſhip was of opinion, it was erroneous, and ordered it to be ſuppreſſed, and a *procedendo* to iſſue.

Smith

23 June, 1753.

Smith v. *Edwardſon.*

THE defendants, the infants, being in contempt to an attachment for want of anſwers, were brought into Court, to have a guardian aſſigned: the ſenior Six Clerk not towards the cauſe, is uſually appointed; but in this caſe, the infants praying their father might be aſſigned their guardian, the Court aſſigned him to be their guardian.

29 June, 1753.

Parry v. *Morgan.*

THE plaintiff after filing his bill, to which defendant *Morgan* put in an anſwer, being adviſed to amend it in divers particulars, which required a new engroſſment, did, without an order for that purpoſe, file an amended bill, to which the defendant *Tonge* was named a party; and the defendants appeared to both bills; on motion for the purpoſe, liberty was given to the plaintiff, to amend his bill, on payment of 20*s.* coſts; and for that purpoſe to take the laſt engroſſment off the file, and to amend the ſame, amending the defendant *Tonge*'s copy.

5 July, 1753.

Newton v. *Dent.*

Defendant in contempt, and being arreſted, gives his bail bond, and puts in a plea; the plea diſcharged for irregularity.

THE defendant being in contempt to an attachment, for want of his anſwer, obtained ſeveral orders for *time to anſwer*, but neglecting to put in his anſwer,

ſwer, the plaintiff on the 8th of *June*, 1783, ſued out an attachment with proclamation againſt the defendant, returnable the 24th of *June*, and on the 16th of *June*, the defendant was arreſted thereon, and he gave his bail bond, and the ſheriff returned a *cepi corpus*, and thereupon on the 25th of the ſame *June*, the plaintiff obtained an order for the meſſenger to bring the defendant into Court to anſwer his contempt. On the afternoon of the ſame 25th of *June* the defendant put in a plea, pleading a former ſuit inſtituted by the preſent plaintiff for the ſame purpoſe ſtill depending. The plaintiff applied this day by Mr. Solicitor General, Mr. *Clark*, and Mr. *Robins*, to diſcharge the plea for being irregularly put in; the defendant having obtained an order only for time to anſwer, and being in contempt for want of an anſwer.

Newton v. *Dent.*

It was oppoſed by Mr. *Henley* and Mr. *Green*, of counſel with the defendant; and Lord *Hardwicke* C. ordered the plea to be diſcharged: but it was ordered, that on the defendant's entering his appearance with the regiſter in a week, conſenting that a commiſſion of ſequeſtration ſhould iſſue againſt him, in caſe he did not put in his anſwer by the time after mentioned, he ſhould have ſix weeks further time to put in his anſwer.

Torin v. *Fowke.*

30 July 1753.

THE plaintiff came in under a decree in a cauſe wherein he was no party, to prove a debt, and to receive ſatisfaction, for which he had filed his bill.

If

Twin v. *Fowke.*

If the plaintiffs in the former cauſe delay proſecuting, the plaintiff in the other was to be at liberty to proſecute the decree in the name of the plaintiffs to that ſuit, indemnifying them.

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8 Nov. 1753.
1 Wils. 213.
S. C.

Lake v. *Lake.*

An objection was taken to reading parol evidence in ſupport of the legal operation of a will.

Lord *Hardwicke* C. cited *Littlebury* v. *Buchley*, where parol evidence was read in ſupport of the legal operation of a will, to rebut an equity for the reſulting truſt; and declared the preſent caſe was to the ſame effect, and over-ruled the objection.

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14 Nov. 1753.

Handeſide v. *Brown.*

Bill in another cauſe admitted to be read at the hearing of this, as a corroborating circumſtance to prove a ſtale demand.

The bill was to ſet aſide ſeveral conveyances obtained from Sir *John Thornecroft*, for fraud and impoſition, charging that the conſideration money (if any) was paid to one *Wills*, who was in colluſion with the defendants, and repaid the ſame to them. The defendants inſiſted on the fairneſs of the tranſaction; and in order to prove the payment of the conſideration money to *Wills*, who acted as attorney for Sir *John Thornecroft*, the defendants, at the hearing of the cauſe, offered to read a bill filed by Sir *John Thornecroft* againſt *Wills*, for a general account of dealings, and tranſactions, whereby he charged *Wills* particularly,

particularly, with having received the conſideration money for the aforeſaid conveyances, and which he had embezzled.

The plaintiffs objected to reading the ſaid bill, for that a bill was made up of the allegations of counſel; that at law it never was admitted; and they had never heard it had been admitted in this Court. And the reaſon why an anſwer was admitted to be read was, for that it was upon oath.

It was ſaid on the part of the defendant, that it was read as a corroborating circumſtance of a ſtale fact.

Lord *Hardwicke* C.—The queſtion is, firſt, whether a bill in another cauſe can be read as legal evidence againſt a perſon no party to that ſuit.

Secondly, Whether it can be read as a corroborating circumſtance to prove a ſtale fact, the witneſs being dead. His Lordſhip cited *Snow* v. *Phillips*, 1 *Sid.* 220 (*a*). *Woollet* v. *Robert*, 1 *Ch. Cas.* 64. *Mountford* v. *Ranie*, 2 *Keble* 499., and ſtated they were all the caſes he could find on what had been ſaid concerning the preſent queſtion. The intent of this evidence is to prove a matter of fact: and as an anſwer was put in to the bill, it proves privity, and brings it within the two firſt caſes. But as I am not willing to break through the modern rule (which doth not permit bills in another cauſe to be read as legal evidence), I ſhall therefore conſider, whether it may not be read to verify a ſtale fact, and I am of opinion it may as a corroborating circumſtance.

(*a*) 1 Kebl. 782. S. C.

His Lordſhip therefore over-ruled the objection, and allowed the bill to be read.

Lord

24 Nov. 1753.

Lord *Lempter* v. Earl *Pomfret.*

Tenant in tail refuſed a diſcovery of a ſettlement.

THIS came before the Court on exceptions to the Maſter's report, he having reported the defendant's anſwer inſufficient.

The bill was for diſcovery of title deeds, and for an injunction to ſtay waſte: the plaintiff charging that the defendant his father was tenant for life only, ſubject to waſte, with remainder to him in tail.

Lord *Hardwicke* C.—A plaintiff is entitled to come for a diſcovery of deeds, or facts, where he wants them as auxiliary to relief, or for remedy at law, but not without any occaſion for ſuch relief, or remedy.

If there be deeds relative to an eſtate touching which no relief, or remedy is wanted, yet, if the party have occaſion to mortgage, he may be entitled to a diſcovery.

So as between father and ſon.

If a reaſonable propoſal of marriage were made to the ſon, and the father refuſed to diſcover deeds, a court of equity might grant a diſcovery: but that is not the caſe here: and it is incumbent on a court of equity not to give way to new inventions, that may create miſchiefs.

The queſtion now before me is, Whether the anſwer can be ſaid to be ſufficient without breach of the courſe of the Court; for the bill doth not charge the ſettlement to be in the cuſtody of the plaintiff, and that he hath threatened, or intends to deſtroy it.

And though in caſe of a jointreſs, the Court will direct a delivery of title deeds on confirming her jointure;

ture; yet, as between father and ſon, the Court has always ſuffered the ſettlement to remain with the father for the benefit of the family, unleſs he hath threatened, or intended to deſtroy it.

That is not the caſe here; nor is it credible. The defendant the father is tenant for life, not ſubject to waſte. It is his own ſettlement, and he ſwears he is diſpuniſhable for waſte.

Therefore allow the exception.

Emmet v. *Ayliffe*.

8 Dec. 1753.

(Reg. Lib. A. 21.)

THE queſtion aroſe upon a policy of inſurance of a ſhip bound from *Naples*, which was ſeized there. An action having been brought on the policy, the plaintiff filed his bill for an injunction, and for a commiſſion to examine witneſſes to enable him to proceed at law, but prayed no relief.

An injunction was granted, and continued upon terms, and the plaintiff, and defendant to be at liberty to examine perſons named in the order, and each ſide to have liberty to croſs-examine.

On the 12th *February* 1755, the defendant, after ſtating the above order, and that he had examined his witneſſes, and that the plaintiff had croſs-examined them, but had not ſued out a commiſſion, moved that the injunction might be diſſolved, and that the depoſitions taken on the part of the defendant be publiſhed, and that he might read ſuch depoſitions as evidence at the trial at law.

After

Emmet v. *Ayliffe*.

After hearing counſel on both ſides, the Lord Chancellor diſſolved the injunction, and ordered the depoſitions to be publiſhed. His Lordſhip cited *Royal Exchange Aſſurance Company* v. *Barker*, 10th *December* 1742 (*a*).

(*a*) The like order in Elcock v. Spencer, 25 May 1756. Parker v. Gardiner, 18 March 1738.

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13 Dec. 1753.

James Tuckfield and *Frances* his wife, Plaintiffs.

James Buller the elder, and *James Buller* his infant ſon, - - - } Defendants.

(Reg. Lib. B. fol. 39.)

Partition of an eſtate, the legal eſtate being in truſtees. One of the *ceſtui que* truſts being an infant, the conveyance reſpited, until he attained twenty-one, and the parties to hold, and enjoy in the mean time.

William Gould, ſeiſed in fee of eſtates in the county of *Devon*, and of other eſtates, for long terms of years, died inteſtate, leaving *Elizabeth* his widow, and two children, the plaintiff *Frances*, and *Elizabeth*, afterwards the wife of the defendant *James Buller*, and the infant, his heirs at law, who became ſeiſed of the eſtates, ſubject to an annuity of 200*l.* to *Elizabeth* their mother, by way of jointure.

Elizabeth the daughter having attained the age of twenty-one, in conſideration of, and previous to her marriage with the defendant *James Buller* the elder, by proper deeds, conveyed all, and ſingular her undivided ſhare of the ſaid eſtates to Sir *John Clark* baronet and another, and their heirs, &c. to the uſe of the ſaid intended huſband for life, remainder to truſtees to preſerve, &c.; remainder to the wife for life; remainder to truſtees to preſerve, &c.; remainder to the firſt, and other ſons of the marriage in tail male,

with other remainder over; with remainder in fee to the ſaid defendant *James Buller*.

And in the releaſe there is a proviſo, that in caſe a partition of the eſtate ſhould take place, the ſaid truſtees ſhould do every act to perfect ſuch partition, and that after ſuch partition, the truſtees ſhould ſtand ſeiſed of the moiety of the divided lands to the ſame uſes as the *Buller*'s undivided moiety ſtood limited.

On the marriage of the plaintiffs, the plaintiff *Frances* not being of age, by articles dated 17th *March* 1740, the plaintiff *Frances* covenanted, when of age, to convey her undivided moiety of the freehold eſtate to *John Yard*, and others therein named, and their heirs, to the uſe of the plaintiff *John* for life; remainder to the wife for life, with remainder in ſtrict ſettlement; with the ultimate remainder to the plaintiff *John* in fee.

The plaintiff *Frances* having attained the age of twenty-one, the plaintiff levied a fine, and freſh articles were entered into, which bore date the 12th of *June* 1745, but no alteration was made in the limitations, except in the ultimate remainder, which, inſtead of being to the plaintiff *John* in fee, was to be as the plaintiffs ſhould appoint, and in default of appointment, to the uſe of the ſurvivor in fee.

The defendant *James Buller* the elder having, as it was alledged, got into poſſeſſion of the eſtate, and cut down timber, the bill, beſides praying partition, prays an account, &c.

The cauſe was heard this day (*a*), when a partition was directed of the eſtate in moieties between the plaintiff, and defendant, to be held and enjoyed in ſeveralty, and the parties were to execute mutual con-

(*a*) 5 Feb. 1749. Reg. Lib. B. fol. 295.

Tuckfield et ux. v. *Buller* and ſon.

veyances of their reſpective allotments, which the Maſter was to ſettle; and the defendant, *James Buller* the infant, was to execute the conveyance when he attained twenty-one, unleſs he ſhewed cauſe to the contrary; and the party to hold, and enjoy in the mean time.

A commiſſion of partition iſſued. The commiſſioners executed it, and the Maſter ſettled conveyances of the reſpective allotments.

At the firſt ſeal after Mich. Term 1753, the plaintiffs, by Mr. Solicitor General, Mr. *Noel*, and Mr. *Capper*, their Counſel, moved that the execution of the conveyances might be ſuſpended until the infant attained the age of twenty-one, and was capable of executing the deeds; and argued the impropriety of executing them ſooner.

Mr. *Henley*, and Mr. *Wilbraham* were Counſel for the defendants, and urged, that the decree was ſuch as was uſually made in ſuch caſes, and cited *Davenport* v. *Oldis*, decided by the Lord Chancellor, 8th *July* 1738 (*a*), by which the parties of age were to execute, and the infant when he attained twenty-one, unleſs he ſhewed cauſe to the contrary.

(*a*) Vid. 1 Atk. 579.

Lord *Hardwicke* C. ſaid he would conſider of the caſe, and it ſtood over until this day (*b*), when he delivered his opinion.

(*b*) 13 Dec. 1753. Reg. Lib. B. fol. 39.

In the caſe before me there hath been a decree directing a partition: one of the parceners is an infant; and by the decree mutual conveyances are to be executed, and the infant to join when twenty-one, unleſs he ſhew cauſe to the contrary; and the parties to hold, and enjoy in ſeveralty in the mean time.

The

Tuckfield et ux. v. *Buller* and ſon.

The objection is; that, as the conveyances are to be mutual, it is abſurd that one ſhall execute, and convey away his freehold, and the other to have it in his power to object when he attains twenty-one. A caſe of *Davenport* v. *Oldis*, ſaid to have been determined by me, hath been cited in ſupport of the decree: I might make ſuch a decree; and I am apt to think others ſimilar to it may be found, but I think them wrong; and thinking them ſo, it is proper they ſhould be ſet right.

Look into precedents, and ſee what is the courſe of the Court in decrees, where there is an infant. In decrees of foreclоſure, where the infant is mortgagor, the legal eſtate is not in him; it is only the equity of redemption: and the only cauſe he can ſhew is upon the face of injuſtice, but if right, no cauſe will lie. But where there is an infant, and the legal eſtate is in him, the parol may demur, and the Court will not decree it. See the caſe of Lord *Brook* v. Lord *Hertford*, *Hil.* 1728, 2 *P. Wms.* 518. which is a ſtrong caſe in point. There the legal eſtate was deviſed to, and was in truſtees, and the *ceſtui que truſt* was an infant. It is ſo in the preſent caſe: I think the application reaſonable, and, therefore, let the execution of the conveyances be reſpited until the infant comes of age, or further order (*a*).

(*a*) Ambl. 197. S. C. & Hubble v. Read, 23 April, 1784. Similar caſe determined by Lord Thurlow C. upon the ſame ground, after doubting, and ſeeing the above caſe. J. D.

16 Dec. 1753.
Ambl. 130. S.C.

Walton v. *Tryon.*

Queſtion as to tithes of lopping of ancient pollard oaks, and of beech wood, as well as the bodies as lopping.

THE above cauſe ſtood this day for judgment.

Lord *Hardwicke* C.—The plaintiff's bill is for an account of, and ſatisfaction for, tithes of three ſpecies.

1ſt. Tithes of lopping of ancient pollard oak, and aſh cut in a wood called *Aſhurſt Wood*, in the pariſh of of *Mitcham* in the county of *Surry:*

2d. Tithes of beech wood, as well the bodies, as tops:

3d. Tithes of rabbits, bred and ſold from the warren called *Aſhurſt Warren:*

The principal queſtion ariſes on the two firſt ſpecies of tithes; as to which it is proved, that there is no coppice, or underwood; that the oaks and aſhes are ancient pollard trees; that the beeches are of twenty years growth or upwards; and that the far greateſt part was cut *and made into faggots for fire*; ſome ſmall part only having been made into poſts, and rails, and uſed for wheelwright's work.

It is alſo proved that tithe hath been paid for the wood ſo fallen at former falls.

The general point made by the bill is, that for all fire-wood of ſuch kind as in the bill, cut or made into faggots, tithe is due to the rector: and this hath been argued on reaſon, and on precedents; and the great precedent of *Greenaway* v. the Earl of *Kent* is relied on.

I therefore will conſider it firſt on reaſon, and then on authorities.

It

It is argued on reaſon, that tithe ought to be paid of wood, as of any other growth of the earth, which *annuatim renovat*. But this proves too much: That all wood pays tithes. All wood increaſes yearly as coppice wood; but though all wood *annuatim creſcit*, yet *non annuatim renovat*; and coppice wood is ſubject to tithe though *non annuatim renovat*. Yet the law takes notice of it to be cut, or taken in a certain ſpace of time; like the caſe of ſaffron, which, though gathered but once in three years; pays tithes; but of timber trees the rule is otherwiſe, and the law doth not expect a ſtated time of felling them; but they are conſidered as part of the inheritance.

Loppings of pollards are tenantcy profits, and ſhould anſwer tithes; and in many places, loppings of ſpiral trees are allowed to the tenant; yet thoſe are timber.

It is argued, that the uſe for which wood is cut, determines whether it be titheable; and that if it is cut for fire, it ſhould anſwer tithe.

If this ſhould be admitted, it would be a dangerous innovation: Certainty is the mother of repoſe, and therefore the law aims at certainty: the ſubſequent uſe of a thing, as it alters not it's nature, cannot add a titheable quality; but a caſe is put where the uſe determines whether it is titheable, viz. where wood is cut to be burnt in the houſe of a pariſhioner within the pariſh, in which caſe it is not liable to tithe; but this is not by common right, but by ſpecial cuſtom.

In many caſes the uſe of the wood at cutting is not known. If ſo, how is it poſſible to ſet out tithes at the felling? And if it were laid down as a rule, that wood was titheable at felling, it would vary the law in ſeveral inſtances, viz. in woods near iron forges,

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and where there is plenty of timber, they cut down timber trees, and apply them for fuel. Therefore if this doctrine, that the ſubſequent uſe of the wood makes it titheable or not, prevails, it would conſtitute two different laws of tithe of wood, in different parts of the kingdom, and produce confuſion.

It is ſaid farther, that by the general rule of the law of tithes, cattle bred for the plough, or pail, do not anſwer tithes, till the general uſe determines, whether they will be titheable or not; but as to colts, tithe is not predial, but mixed, which the owner is not obliged to ſet out at any certain time; the parſon receiving tithes in the ſame manner as of other titheable things, by taking one tenth of the profits the owner makes. They are, therefore, not titheable at dropping, or weaning, on a preſumption they ſhall anſwer tithes afterwards.

Thus much on the reaſon of the thing.

But the law of tithes is poſitive, and is this:

Of all timber trees of the age of twenty years, or upwards, whether they be timber trees by common law, or by cuſtom, no tithe is payable either of bodies, tops, or lops for whatever uſe employed, with this exception, that in certain particulars, where fraud, is attempted, in ſuch caſe timber trees become ſubject to tithe as after mentioned.

This law is declared in the ſtatute of *Sylva Cædua:* But coppice, and underwood are liable to tithe.

In the year book of *Edw.* the 3d, it is ſaid, it was never known tithe was paid of great trees, or timber; Stat. of *Sarum,* 2d *Leonard* 80. *Fitzherbert's Nat. Brev.* 51. *Reg.* 49. Lord *Coke,* 2d *Inſt.* 645. *Selden's Hiſtory of Tithes.*

Judgments

Judgments at law have been that timber trees of twenty years growth, or upwards, are free from tithes as well as to lops and tops, as to the body. *Walton* v. *Tryon.*

In *Molin*'s caſe in *Plowden*, 470. the Court was of opinion, horn beam was not timber, and was therefore titheable; and it is now ſettled, unleſs by cuſtom horn beam be timber: And it is ſo laid down in *Liford*'s caſe (*a*), on a queſtion of waſte, 2d *Inſtit.* 642. where the body is free of tithe, every other part is likewiſe exempted, except as to germains growing from roots of trees fallen.

(*a*) 11 Co. 46 b.

It is obſervable, there is a great difference between germins, and tops of pollards.

As to germins, nothing is remaining of trees; but in caſe of pollards, the body remains, which will exempt the branches. See (*b*) *Croke, Eliz.* 477. *Moore* 908. *Littleton* 108.

(*b*) Ram v. Patenſon.

I will next conſider the caſes cited againſt theſe authorities.

Firſt *Brownlow* 94. *Man* v. *Somerton*, is not in point.

In 1ſt *Levins* 189, *Hawes* v. *Cornwall*, it is ſaid pollards of fifty years growth, ſhall pay tithes when felled; but this caſe, ſo ſhort, and imperfectly reported, is not to be relied on: it is better reported in 1ſt *Siderfin* 300. by which it appears the wood felled was coppice wood.

Pollards of twenty years growth before topped, are privileged as timber trees; and the bodies of ſuch may be uſed as timber, and are ſo.

The modern precedents in the Court of Exchequer, *Briggs* v. *Martin. Trin.* 6 of *Wm.* and *Mary: Northley* v. *Collard, Mich.* 6 of *Wm.* and *Mary*, are quite contrary,

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And there is no reconciling theſe authorities, but on the ſuppoſition, that the one was lopped before twenty years growth, and the other after.

Layfield v. *Cooper*, 12 *July* 1698, is not relied on.

The great caſe is *Greenaway* v. Earl of *Kent*, in *Hil. Term*, 1705 (*a*), where the Court declared the plaintiff entitled to tithe of all wood above twenty years growth, as well as underwood that was cut and corded, and for bark ſtripped; but not to tithe of wood above twenty years growth, which was not cut, and corded.

(*a*) Bunb. 98.

But there Lord Chief Baron *Ward*, was of another opinion, and the decree was made againſt that opinion, which was founded on the old rules, and was the better opinion.

Biby v. *Huxley*, 22d *February*, 1724 (*b*), is againſt that determination.

(*b*) Bunb. 192.

And the caſe of the Earl of *Kent*, is contrary to former reſolutions, nor is it followed by the ſubſequent reſolutions.

Where I ſay timber wood may be made titheable, it is to prevent fraud.

A parſon may ſhew timber woods, ſo interſperſed, that it is impoſſible to diſtinguiſh them.

As to tithe of beech wood, it is not diſputed; but this is above twenty years growth, and ſo depends on the point, whether beech be timber by cuſtom.

As to tithe of rabbits, if titheable, it is by cuſtom.

An iſſue was offered by the Court, to try whether beech in the ſaid pariſh is timber by cuſtom, and whether the pollards in queſtion, were lopped before the age of twenty years; but the plaintiff declining to try it, the bill was diſmiſſed.

Turner

Turner v. *Mitchel.*

9th Feb. 1754.

PLEA, ſo far as it went to the account, prayed of the perſonal eſtate, allowed; as to the real eſtate, over-ruled.

Aynſly v. *Reed.*

11 Feb. 1754.

(Reg. Lib. A. fol. 565.)

Will eſtabliſhed on a bill by the heir at law; the equity of redemption being in the plaintiff, and ſome of the defendants. In default of redeeming, the bill was to be diſmiſſed as to the defendant,—the mortgagee, and the other defendants were to ſtand foreclоſed.

JOHN *Aynſly* the plaintiff's father being ſeiſed of eſtates at *South Middleton*, called *Highlands*, which he had purchaſed of *William Aynſly*, *ſubject to a mortgage in fee to the defendant Francis Blake Delaval*, for ſecuring 200 *l.* and being alſo ſeiſed of other eſtates in the ſame county, by his will, (after ſome ſpecific deviſes), deviſed the ſaid eſtate called *Highlands*, and other eſtates therein deſcribed, to the defendant *Reed*, his heirs and aſſigns, *ſubject* to the payment of his debts, and legacies, to the uſes following; to the plaintiff for life, remainder to truſtees to preſerve, &c. but nevertheleſs to permit the plaintiff, to receive the rents and profits, *after* his, the teſtator's, *debts* and legacies were *paid*, and not *ſooner*; remainder to the plaintiff's ſons and daughters, by any other wife than the preſent, in ſtrict ſettlement, and in default of ſuch iſſue, then to his two daughters, the defendants, *Mary Davidſon* and *Ann Tweddel*, during their lives as tenant in common; remainder to the defendant *Francis Tweddel* for life; remainder to truſtees to preſerve, &c. during the life of the ſaid *Francis Tweddel*, yet nevertheleſs after payment of the teſtator's debts and legacies,

Aynſly v. *Reed.*

legacies, and *not* ſooner, to permit the defendant *Francis Tweddel*, to receive the rents, &c. during his life; with remainder to his firſt and other ſons, in tail male; remainder to his grandſon, the defendant, *George Tweddel*, in like manner, but not to receive the rents, &c. till the debts and legacies were paid; with remainder to his firſt and other ſons, in tail male; with the ultimate remainder to the teſtator's own right heirs: and the teſtator directed his truſtee, immediately after his death, to enter upon his ſaid truſt eſtates, and receive the rents, &c. and charged and made chargeable the ſame, with the payment of his debts, &c. and directed him thereout to pay the mortgage to the defendant *Delaval*, and his other debts, and appointed the plaintiff the ſole executor.

The plaintiff proved the will, and the defendant *Reed* entered on the eſtates.

The bill was for an account of the teſtator's perſonal eſtate; for an account of what was due on the defendant *Delaval*'s mortgage, and of the teſtator's other debts, &c.; that defendant *Reed* might act in the truſt; and that if the perſonal eſtate were not ſufficient to pay, the deficiency might be raiſed by ſale, or mortgage of the truſt eſtates.

Reed by his anſwer admitted the will, and admitted his having entered on the eſtate, and ſubmitted to act.

By the decree dated this day, the plaintiff, the heir at law, *admitting the will*, it was eſtabliſhed, and the truſts ordered to be performed; and an account was directed of what was due on *Delaval*'s mortgage; and upon the plaintiff's, or upon the defendants', *Mary Daviſon*, *Ann Tweddel*, *Francis Tweddel*, and *George Tweddel*, paying what ſhould be found due, the mortgagee

gagee was to convey, &c. and in default of the plaintiff's or the ſaid defendants', redeeming, the bill as to the defendant, the mortgagee, was to be diſmiſſed, and theſaid defendants were to ſtand foreclo ſed; but in caſe the plaintiff, or the ſaid defendants, or any of them, ſhould redeem, the equity of redemption, was to be in the perſon ſo redeeming, ſubject, and liable to ſuch truſts, and limitations, as were declared by the will, concerning the ſame. *Aynſly* v. *Reed.*

The decree then goes on to direct an account of the perſonal eſtate, and the other accounts neceſſary towards executing the truſts.

Grimmet v. *Grimmet.*

(Reg. Lib. A. fol. 199.)

21 Feb. 1754. Ambl. 210. S.C.

William Grimmet, made his will, dated 13th *March* 1749, as follows: "I give 20 *l. per ann.* to my brother *Francis Grimmet*, during his life, to be paid half-yearly, from the day of my death, out of the intereſts of money in the public funds or mortgage, or any my real eſtates or perſonal eſtates, of which I ſhall ſtand inveſted; and I give all the reſt and reſidue of my real and perſonal eſtate, in twenty-four equal parts, in manner therein mentioned," and the teſtator alſo gave $\frac{5}{24}$ parts to *his wife for her life.*

5-24 parts of the reſidue of the teſtator's perſonal eſtate after the death of his widow, and 20 l. a year after the death of his brother, or which ſhall be deemed equivalent, 750 l. in ſome of the public funds to ſtand in the names of truſtees, until the whole could be laid out in lands to the *ſatisfaction* of the governors of the charity, and his executors, who were always to be conſidered as truſtees of the charity, to which it was given, held not to come within the Statute of Mortmain.

By a codicil dated 24th *March* 1749, taking notice, that $\frac{5}{24}$ parts of his eſtates, after payment of his legacies, and for expences remaining undiſpoſed by his will, and alſo taking notice of the annuity of 20 *l.* a-year given to his brother *Francis*, for his life, he expreſſes himſelf thus: "My further will and pleaſure is

Grimmet v. Grimmet.

is, that the $\frac{5}{24}$ parts of the remains of my eſtate, after the death of my wife, my juſt debts, funeral expences, pecuniary legacies, firſt paid, together with the 20*l.* a year, which my ſaid brother *Francis* is to enjoy during his life, after his death, are to be applied in clothing, and educating twenty poor boys of the pariſh of *Brighthelmſtone*, in *Suſſex*, in the principles of the proteſtant religion; and I appoint the miniſter, churchwardens, and overſeers of the ſaid pariſh for the time being, with twelve others of the principal inhabitants, which are to be made choice of at a public veſtry, as governors, or truſtees of the ſaid charity; and my further will and pleaſure is, that the ſaid $\frac{5}{24}$ parts of my eſtate, after debts and legacies are paid, together with the ſaid 20*l.* a-year after the death of my ſaid brother, or what ſhall be deemed equivalent to the ſaid 20*l. per ann.* 750*l.* be in ſome of the parliamentary funds, to ſtand in the names of ſome of the truſtees, (who are to execute a declaration of truſt), *until* the *whole can be laid out* in the purchaſe of *lands to the ſatisfaction* of the governors, and my executors before named, (who are always to be conſidered as governors, or truſtees whilſt living for the uſes aforeſaid), that is, to apply the intereſt, profits, and rents of the ſaid $\frac{5}{24}$ parts of the reſidue of my eſtates, and of the ſaid 750*l.* or the lands to be purchaſed therewith."

The executors after the death of his teſtator proved his will, and poſſeſſed abundantly more than would pay and ſatisfy the debts, funeral expences, legacies, and the ſaid annuity.

The plaintiff inſiſted, that the deviſe of the ſaid $\frac{5}{24}$ parts, and of the fund out of which the annuity of 20*l.*

20 *l.* to the teſtator's brother *Francis* was payable, was void, being within the Statute of Mortmain of the 9th of *Geo.* 2. *Grimmet* v. *Grimmet.*

The miniſter and churchwardens and other truſtees of the charity, inſiſted the bequeſt of the ſaid $\frac{5}{7}$ parts of the reſidue and of the ſaid 20 *l.* a year, or the 750 *l.* in lieu thereof, was not void; for that the ſame was not to be laid out in lands, until it could be laid out to the ſatisfaction of the governors of the ſaid charity; and that therefore the ſame ought to be conſtrued a direction to lay it out in ſome of the public funds only; for that the ſame could never be laid out in the purchaſe of lands, to the ſatisfaction, and approbation of the governors, and truſtees, if ſuch application thereof could any ways be conſtrued to defeat the charity itſelf, and inſiſted it was the intent of the teſtator, that the truſtees ſhould have power to execute the truſts as they thought fit.

On hearing the cauſe this day, Lord *Hardwicke* C. ordered 20 *l.* a year, to be paid to defendant *Francis Grimmet* during his life, and after his death, the ſum of 750 *l.* in lieu of the 20 *l.* a-year as directed by the teſtator's will, to be taken out of *the whole reſidue*, and to be applied for the benefit of the charity.

Fenhoulhet v. *Paſſavant.* 11 March 1754.

IF ſpecialty creditors exhauſt the perſonal eſtate, the ſimple contract creditors are to receive a ſatisfaction *pro tanto*, out of the real aſſets deſcended; and if the debts of the ſimple contract creditors, ſhall not amount to the whole of the perſonal eſtate, which the ſpecialty

Fenhoulhet v. *Paſſavant.*

ſpecialty creditors ſhall ſo exhauſt, the legatees are to ſtand in the place of ſuch ſpecialty creditors for the reſidue of what they ſhall exhauſt out of the perſonal eſtate, and are to be paid *pari paſſu*.

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3 April 1754. 3 Atk. 772. S. C.

Blower v. *Morret.*

Coſts to be paid out of an eſtate being a lien thereon, and do not drop with the party, though not taxed.

BY the decree, all parties were to be paid their coſts out of the eſtate. The defendants, *Morret* and wife, die, before the coſts are taxed, inteſtate, and inſolvent. Mr. *Boldero*, their ſolicitor, applied this day for the Maſter to proceed to tax their coſts, and to be paid the ſame.

It was objected by the reſiduary deviſee, and legatee, that the coſts not being taxed, could not be conſidered as a debt, or judgment; and not being ſo, and the ſuit being abated, and nothing remaining to be done under the decree, the ſuit could not be revived, and conſequently the coſts dropt with the party.

Lord *Hardwicke* C.—There is a diſtinction between perſonal coſts, and coſts to be paid out of an eſtate.

Coſts, when decreed out of an eſtate, are a lien thereon, which makes it a ſecurity: and there being nothing executory, there is no occaſion to revive; therefore let the Maſter proceed to tax the ſaid late defendant's coſts, and let the ſame, when taxed, be paid to Mr. *Boldero*, their ſolicitor.

3 & 25 July 1755. Buckby v. Bird, by ſir Thomas Clarke, M. R. ſimilar determination.

Coſts,

Lord *Herbert* v. *Puſey*.

27 April 1754.

EXCEPTIONS to the joint anſwer of defendant *Puſey* and *Gooſtrey*. *Puſey* died: the exceptions, after ſome doubt, referred as to *Gooſtrey*'s anſwer only.

Mayne v. *Hochin*.

27 April 1754.

If a defendant's anſwer is reported inſufficient, and he is ſerved with an order to amend the bill, and for him to anſwer the amendments and exceptions at the ſame time, he muſt anſwer both before he can apply to diſſolve the injunction that had been obtained on the original bill.

THE plaintiff had obtained an injunction of courſe, till anſwer and further order. The defendant put in his anſwer: upon exceptions, the anſwer was reported inſufficient. The plaintiff obtained an order to amend, and that the defendant ſhould anſwer the amendments, and exceptions at the ſame time. The defendant put in an anſwer, and obtained the common order to diſſolve the injunction, unleſs cauſe. The plaintiff took exceptions to the anſwer to the amended part of the bill; and by way of cauſe, on the 23d of *April*, ſhewed the exceptions, and prayed to refer them; and that the further anſwer to the former exceptions might alſo be referred. A doubt aroſe, whether, as the injunction was founded on the original bill, the defendant was obliged to anſwer both the original and amended bill, before he could apply to diſſolve the injunction.

Lord *Hardwicke* C. ſaid he would conſider it; and on the above 27th of *April* 1754, his Lordſhip declared, that had the defendant put in a further anſwer, upon his firſt anſwer being reported inſufficient, before the plaintiff had obtained the order to amend, and

Mayne v. *Hochin.*

and for the defendant to anſwer the amendments and exceptions at the ſame time, the injunction muſt have *ſtood* or fallen *upon the original bill,* and the anſwer thereto: but the defendant not having anſwered the exceptions before the plaintiff obtained the ſaid order to amend, the original and amended bill became one record, and the defendant muſt anſwer both at the ſame time.

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6 & 10 May 1754. 3 Atk. 798. S. C. Ambl. 224. S. C.

Sparrow v. *Hardcaſtle.*

A grant of an advowſon, and a deed declaring the truſt, though for a particular purpoſe, held to be a revocation of the will as to the advowſon.

Cyril Arthington, by his will, dated 28th *July* 1716, deviſed all his eſtate, both real, which included the advowſon in queſtion, and perſonal, to truſtees and their heirs, with limitations, by which he makes his nephew *Cyril Hardcaſtle,* on condition of changing his name to *Arthington,* tenant for life of his eſtate, with remainder in ſtrict ſettlement.

On the 13th of *October* 1720 he made a codicil.

On the 21ſt of *November* 1723 he made another codicil.

On the 20th of *November* 1723, he grants the advowſon in queſtion to truſtees.

And on the 21ſt of *November* 1723, by deed, declares the truſts.

The queſtion was, whether the grant of the advowſon, and the declaration of truſt, were a revocation of that part of the deviſe of the real eſtate.

Lord *Hardwicke* C.—The general principles are, that a man who deviſes muſt have at the time of making

ing his will, a diſpoſing capacity of mind. He muſt alſo have an eſtate in the land he deviſes, and the eſtate he ſo hath deviſed muſt remain in the ſame plight and condition to the time of his death as it was at the execution of his will: for any alteration of the eſtate in the land, by any act of his will, makes it a different eſtate, and will import a different intention, and will be a revocation of his will, unleſs in certain ſpecial caſes. *Sparrow* v. *Hardcaſtle.*

In *Arthur* v. *Bockenham*, (*a*) Lord C. J. *Trevor* ſays, if *A.* be ſeiſed, and deviſes, and afterwards executes a feoffment, it is a revocation of his will. If there be a feoffment, and no livery, that hath been held a revocation. So, if a man executes a bargain, and ſale, and acknowledges it, and it be not inrolled, yet it is a revocation. (*a*) Fitzg. 233. Holt. 750. S. C.

And in the Earl of *Lincoln* v. *Rolls*, (*b*) it was held, that where the Earl of *Lincoln* had deviſed his eſtate to his heirs male, and afterwards taking it into his head a lady might be diſpoſed to marry him, (though he had never aſked her the queſtion), makes a ſettlement of that eſtate to the uſes of the marriage: though he never did marry, and the conveyance was for ſuch a whimſical purpoſe, yet it was held to be a revocation of his will. (*b*) 1 Eq. Ca. Abr. 411. Show. P. C. 154. S. C.

So a man apprehending himſelf to be ſeiſed, and afterwards ſuſpecting he has only an eſtate tail, his ſuffering a common recovery is held to be a revocation.

The diſtinction made in the preſent caſe is, that Mr. *Arthington* being ſeiſed in fee of the legal eſtate of the advowſon, and after deviſing it, did on the ſame day execute a grant of the advowſon, which,

Sparrow v. Hardcaſtle.

though a general grant, appears to be for a particular purpoſe, *viz.* to create a truſt for the benefit of ſuch ſon of *I. S.* as on avoidance might be preſented, and then to himſelf, and his heirs; which is the ſame as if he had left the truſt to reſult, which would have paſſed by virtue of the deviſe.

But there is no authority for this, and I am of a different opinion.

I think that this is a new eſtate, and will not paſs by his will, he having parted with the whole legal eſtate, but that it muſt deſcend to his heir.

The excepted caſes have been confined to mortgages, and ſecurities.

In caſe of a mortgage in fee, though a total revocation at law, yet in equity the eſtate ſhall paſs, ſubject to the mortgage.

And the deviſee declining to try at law the time of the execution of the two deeds of the 20th and 21ſt of *November* 1723.

Declare the will and codicil, as far as they relate to the advowſon revoked, and the truſt for the benefit of a ſon of *I. S.* being performed, let the truſtees convey the advowſon to the heir.

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28 May 1754. Ambl. 228. S. C.

Da Coſta v. *Da Paz.*

Where a gift to a charity was not void, but ſuch as the Court could not tolerate, application was directed to be made to the King for his ſign manual, to direct to what charitable uſes he would have it applied.

THE teſtator, being a Jew, by his will gave 1200 *l.* to be placed out at intereſt, and the intereſt to be applied in ſupport of a Jeſuba (a kind of ſemi-

nary),

nary), wherein to read, and inſtruct youth in the Jewiſh religion. It being a charity which, though not void by law, the Court could not tolerate, Lord *Hardwicke* C., upon the ſpecial reſervation by the decree concerning the ſaid legacy, declared the ſame ought not to fall and accrue to the reſidue of the teſtator's perſonal eſtate, but ought to be applied to ſome other charitable uſe; and that the appointing and directing of that charitable uſe was in the Crown: and his Lordſhip recommended it to the Attorney General to apply to the King for a ſign manual to appoint and direct to what charitable uſe or uſes the ſaid 1200 *l.* and intereſt ſhould be applied (*a*).

(*a*) His Majeſty appointed 1000*l.*, part of it, to the Foundling Hoſpital. J. D.

Newman v. *Norris.*

27 May 1754.

THE decree directed an account of the eſtate of the plaintiff's teſtator come to his hands, or uſe, and of his debts, and the creditors to come before the Maſter and prove their debts. The plaintiff being a creditor, the Maſter doubted the admitting of him to prove his debt.

The plaintiff admitted to prove his debt before the Maſter.

Lord *Hardwicke* C. directed the plaintiff to be at liberty to go in before the Maſter and prove his debt, and the Maſter to examine him relating thereto, notwithſtanding he was a party.

27 May 1754.

Smart v. *Floyer* et è contra.

Original bill being abated by inter-marriage of the plaintiff, and not being revived until after a croſs-bill is filed, loſes its priority.

Dorothy (the wife of the defendant *Peter Floyer*), *dum ſola*, exhibited her bill againſt the defendant *Smart*, the plaintiff in the croſs cauſe. She afterwards married the ſaid *Peter Floyer*, whereby her ſuit abated; but ſhe neglected to revive the ſuit until after *Smart*, the defendant to her ſuit, had filed a croſs-bill againſt her, and her huſband. On the 15th of *May* 1754, *Floyer* and his wife obtained an order for time to anſwer the bill filed by *Smart*, until he ſhould have anſwered the original bill filed by the ſaid *Dorothy*.

Upon application by *Smart*, to diſcharge the order, Lord *Hardwicke* C. held, that the ſaid *Floyer* and his wife, by their marriage (being their own act), which occaſioned the abatement; and having neglected to revive until *Smart* had filed his croſs-bill againſt them, had loſt their priority of ſuit, and therefore diſcharged the order.

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19 June 1754.

The Earl of *Bath* and others, Plaintiffs.
Elizabeth Abney ſpinſter, - Defendant.
(Reg. Lib. A. fol. 567.)

The executor of a ſurviving truſtee of a term of years in a copyhold, is to come in and be admitted, and to pay a fine.

The bill is to ſtay the defendant's proceeding at law for recovering poſſeſſion of the premiſes in queſtion, which are copyhold, and held of the manor whereof the defendant is lady.

Henry Gray Eſquire being ſeiſed to him and his heirs, at the will of the lord, according to the cuſtom of

of the manor of *Stoke Newington*, of ſixty acres of meadow land in *Stoke Newington*, made his will, dated the 6th *July* 1709; and thereby, amongſt other things, deviſed the ſaid ſixty acres of meadow land to *John Taylor* Eſquire, and *Arthur Lake* Gentleman, their executors and adminiſtrators, for the term of ninety-nine years from the 25th of *December* next before the date of the ſaid will, if *Harry Pulteney* Eſquire, therein deſcribed, *Edward Sergeant*, and *Joan Muncaſter*, therein named, ſhould ſo long live, but upon certain truſts therein mentioned; and deviſed the inheritance, after the determination of that term, to the uſe of *William Pulteney*, now Earl of *Bath*, for life, with remainder to truſtees to preſerve contingent remainders; with remainder to his firſt, and other ſons in tail male, with other remainders over; with the ultimate remainder, in caſe of the limitations not taking effect, to the plaintiff, now Earl of *Bath*, in fee.

At a Court Baron held for the ſaid manor, the 11th of *February* 1711, the ſaid *John Taylor*, and *Arthur Lake* were admitted to the ſaid ſixty acres of meadow land, according to the cuſtom of the ſaid manor, and paid a fine of 280 *l.*

The caſe herein-after mentioned ſtated, that *Edward Sergeant*, one of the three lives upon which the leaſe for ninety-nine years was to determine, was dead, but that the other two lives were in being.

That the ſaid *Arthur Lake* was dead; that *John Taylor* ſurvived him, and died 4th *September* 1735, and made his will, and *John Taylor* and others, ſince dead, his executors; that *Peter Taylor* was ſtill living.

Earl of *Bath* et al. v. *Abney*.

That the defendant *Elizabeth Abney* was lady of the ſaid manor, and had been ſo for upwards of four years.

In 1752, till which time, it did not appear the ſaid *Elizabeth Abney* had any notice of the deaths of the ſaid *John Taylor*, and *Arthur Lake*, application was made to the Earl of *Bath* that ſome perſon ſhould come and be admitted to the ſaid copyhold premiſes: and the ſaid Earl inſiſted there was no occaſion for any perſon to be admitted thereto.

At a general Court Baron held for the ſaid manor the 7th of *May* 1752, the deaths of the ſaid *John Taylor* and *Arthur Lake* were preſented, and proclamation made for the heirs of the ſaid *John Taylor*, or any other perſon who had any title to the ſaid copyhold premiſes, to come in, and be admitted.

That cuſtomary eſtates, parcel of the ſaid manor, are uſually granted in fee; but ſome times, at the deſire of purchaſers, or under limitations in a will, have been granted for a life or lives, with remainders over; but there was no inſtance of any grants in the ſaid manor for terms of years abſolute.

That among other cuſtoms of the ſaid manor, a fine is due to the lord or lady thereof, upon the death or alienation, as well of the tenants who are admitted in fee, as of thoſe who are admitted for their life, or lives only, with remainders over: and the fines on admiſſion to copyhold eſtates in the ſaid manor are uncertain, and at the will of the lord; but that there was an uſual or cuſtomary way of aſſeſſing fines, which is ſtated in the caſe.

The caſe then ſtates the yearly value of the copyhold in queſtion.

It

It was argued, that a copyholder, by the general law of the land, unleſs there be any particular cuſtom in it, may, if ſeiſed in fee, ſurrender a copyhold for a term of years; and if he ſurrender it to truſtees, who are admitted, thoſe for whoſe benefit it is made ſhall be entitled to the benefit of the remainder of the term, without a new admittance. 1 *Inſt. B.* 1. 1 *Leon.* 4. 4 *Leon.* 118. 2 *Dan.* 190. 3 *Leon.* 9. *Dy.* 251. 1 *Leon.* 173. *Hob.* 181.

If a man, tenant for life, with remainders over, is admitted, that admiſſion holds to all the remainders, without a new admiſſion in fee, except under a ſpecial cuſtom. It is ſo laid down in *Barnes* v. *Corke*, 3 *Lev.* 308. *Rennington* v. *Cole*, *Noy.* 29. *Blackburn* v. *Graves*, 1 *Mod.* 120.

It was alſo ſaid, that if a wife, tenant for a term of years, marries, and dies before the time is expired, her huſband ſhall continue without a new admiſſion, or fine.

Lord *Hardwicke* C.—There are two queſtions in this cauſe; one, whether this is a proper bill for this Court: the other, if proper, whether the plaintiff is entitled to be admitted without paying a fine.

I do not find any judicial opinion cited to me, that an executor need not come to be admitted to a copyhold.

As to the fine, it is matter of another conſideration.

Therefore let a caſe be made for the opinion of the Judges of the Court of King's Bench, upon the facts ſtated in the agreement between the parties of facts and things to be admitted at the hearing, which hath been now read, together with the material facts which

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have been proved by *Joſeph Barker*; and thereupon let the following queſtions be ſtated:

Firſt, whether the ſurviving executor of *John Taylor*, the ſurviving truſtee of the term of ninety-nine years, ought to come in, and be admitted tenant to the copyhold premiſes in queſtion.

And ſecondly, in caſe he ought, whether the defendant, the lady of the manor, will be entitled to any fine, on ſuch admiſſion.

24 Feb. 1757. Reg. Lib. A. fol. 477. 1 Burr. 206.

The Judges certified, that having heard counſel on both ſides, and conſidered the caſe, they were of opinion, the ſurviving executor of *John Taylor*, the ſurviving truſtee of the term of ninety-nine years, ought to come in, and be admitted tenant to the copyhold premiſes in queſtion, and that the lady of the manor would be entitled to a fine on ſuch admiſſion.

Manſfield.
T. Deniſon.
M. Foſter.
J. E. Wilmot.

The plaintiff being adviſed to proceed no further in the cauſe, applied for and obtained an order (*a*) to diſmiſs the bill with coſts.

(*a*) Dated July 1757. Reg. Lib. A. fol. 477.

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27 July 1754. 2 Veſ. 538. S. C.

Ex parte *Dupleſſis*.

A COMMISSION of *melius inquirendum* directed to iſſue in this caſe for the King.

Gage

Gage v. Counteſs of *Stafford.*

27 July 1754.
2 Veſ. 556. S.C.

The plaintiff being abroad, ſecurity given to anſwer the full coſts.

THE matters in queſtion in the cauſe aroſe in *France*; and proceedings had been had in the Court of Actions in that kingdom. The plaintiff, who reſided abroad, commenced a ſuit in this Court, and proceeded in the cauſe, until iſſue was joined. Being adviſed it would be neceſſary to give in evidence the adjudication in the Court of Actions, he applied this day for a commiſſion to examine witneſſes in *France.*

The defendant objected that the plaintiff lived abroad, that the ſuit had been very expenſive, and would be more ſo, and engrafted upon the plaintiff's motion, that it be upon the terms of giving ſecurity for the full coſts.

Lord *Hardwicke* C.—I think the objection well founded; and as the plaintiff comes here to aſk a favour, the Court may put terms upon him; and therefore, upon the plaintiff's conſenting to give ſecurity in 300 *l.* to anſwer coſts, be it as prayed.

Kinſey v. *Yardley.*

24 May 1753.

A party to a ſuit in contempt, and in cuſtody, muſt be turned over to the priſon of the Fleet, before a ſequeſtration can iſſue againſt him.

THE defendant being charged in the cuſtody of the ſheriff of with an attachment for not performing a decree, on the plaintiff's application for a ſequeſtration, a queſtion aroſe, whether the defendant ſhould not be brought up by *habeas corpus cum cauſis*, and turned over to the Fleet.

Lord

Kinſey v. Yardley

Lord *Hardwicke* C.—It is neceſſary to know the practice: where a duty is decreed, an attachment iſſues; for the firſt proceſs muſt be perſonal; where ſuch attachment iſſues, and the defendant is taken up, and in the cuſtody of the ſheriff, and a *cepi corpus* returned, the queſtion ariſes, whether the plaintiff may apply for a ſequeſtration, without having the defendant brought into Court, and turned over to the Fleet; and I am of opinion, the courſe of the Court is, where the defendant is in contempt, and in the cuſtody of the warden of the Fleet, the plaintiff may have a ſequeſtration; but it is not the courſe of the Court to have a ſequeſtration, where the party is in the cuſtody of a ſheriff: *Culin* v. *Duffin*, is a precedent againſt this; but no attention was had to it, and the order was made of courſe, and I will lay it out of the caſe.

The ſequeſtration in this caſe, was not the ancient practice of the Court, but was found neceſſary, and there are greater reaſons for it here, than at law; for at law, where a *capias ad ſatisfaciendum* firſt iſſues, the party can have no other ſatisfaction, and the reaſon is, the party might have taken out a *fieri facias*, or an *elegit*, and was not obliged at law to begin with perſonal proceſs.

But here the Court *agit in perſonam*, and the plaintiff was obliged to take the firſt proceſs againſt the perſon, (unleſs he be a privileged perſon), and as the plaintiff is under ſuch an obligation, and a defendant will obſtinately lie in gaol, it is neceſſary to iſſue proceſs againſt his effects.

I have looked into the precedents of Mr. *Goldeſborough*, the Regiſter, and find ſequeſtrations were firſt laid on the things in queſtion, and then further extended,

tended, and laid on all the real, and perſonal eſtate of the contemnor: In *Thomas* v. *North*, 17th *Car.* 1. fol. 558. the plaintiff inſiſted on being put into poſſeſſion of the lands pledged to him; the defendant (who was a priſoner for a contempt at the plaintiff's ſuit) oppoſed it as a double execution; but the Court aſſiſted by the Judges, were of opinion, that the plaintiff's holding the lands was juſt, and upon the defendant's aſſuring the lands to the plaintiff, he was to be diſcharged from his impriſonment; ſo in *Perriman* v. *Dinham* (*a*), in the ſame year, the defendant was committed, for not performing a decree, and a ſequeſtration was granted, and in *Elvard* v. *Warren*, 31 *Car.* 2. (*b*) the although it were inſiſted on as double execution; defendant being in contempt for not performing a decree, an *habeas corpus* iſſued againſt him, and he was brought up, and perſiſting in his contempt, a ſequeſtration was ordered to iſſue; and this is in point.

(*a*) 1 Ch. Rep. 152.

(*b*) 1 Eq. Ca. Abr. 352. 2 C. R. 151. 192 S. C. 3 C. R. 87. S. C.

Conſider the contempt; it is for not performing a decree; a proceſs of contempt is in nature of an execution, and not bailable; if ſo, the juſtice of the Court requires the defendant to be brought into Court, to anſwer his contempt; and when ſo brought, and he doth not ſhew he is not in contempt, the Court commits him; and therefore let an *habeas corpus* iſſue.

Kemp v. *Mackarel.*

7 Aug. 1754. 2 Veſ. 579. S. C.

UPON arguing exceptions to the Maſter's report, an iſſue was directed, to try if certain papers were forged; being upon trial of the iſſue found to be forged, they

Kemp v. *Mackarel.*

they were cancelled in Court, and kept with the Maſter.

20 Dec. 1754.

Dickenſon v. *Bliſſet.*

A PARTY born deaf and dumb, attaining twenty-one, applies for poſſeſſion of her real eſtate, and to have an aſſignment of her chattel eſtate; Lord *Hardwicke* C. having put queſtions to the party in writing, and ſhe having given ſenſible anſwers thereto in writing, the ſame was ordered.

29 Jan. 1755.

French v. *French.*

The probate of the teſtator's will, admitted as proof of his death.

THE bill was brought by the heir at law, of his brother, who in 1740, went to the *Eaſt Indies*, and was drowned there, to be let into poſſeſſion of his eſtate ſold after his death; the defendants who were in poſſeſſion diſputing the death, and the plaintiff having no poſitive proof of his brother's death, a doubt aroſe at the hearing, upon the probate of his will being offered to be read, whether it could be admitted as evidence of the fact.

Lord *Hardwicke* C.—An act of the Prerogative Court cannot certainly be admitted as original evidence of a fact in this Court; but in this caſe, as at the time of proving the will, it muſt be proved the party was dead, and the probate was granted ſo long ſince as 1742, and it would be difficult at this diſtance of time, and conſidering the place of his death, to get more poſitive proof, and the executor who would be entitled to the rent accrued before the death, as his perſonal

perſonal repreſentative admitting his death; his Lordſhip under all circumſtances admitted the probate to be read, as proof of his death. *French* v. *French*.

Cruger v. *Wilcox*, aſſignee of *Charles Watkins*, a bankrupt.

1 Feb. 1755 Ambl. 252. S. C. by the name of Kruger v. Wilcox.

A conſignee parting with the goods conſigned, parts with his lien on them.

ON the 7th of *December* 1750, *Mark Hudſon*, a broker, applied to the plaintiff, to purchaſe 100 tons of logwood, which he was empowered by *Charles Watkins*, and the defendant *Mico*, or one of them, to ſell.

The plaintiff on ſuch application, agreed to purchaſe 104 tons, with cuſtomary allowances, and the money to be paid on or before the 24th of *December*.

Before the 21ſt of *December*, the plaintiff received 65 tons, and on the 18th of *December*, the plaintiff by the order of *Watkins*, paid *Hudſon*, 810 *l.* in part.

During the tranſaction, and *till after the* 18th of *December*, *Watkins* was in good credit, and his circumſtances not dubious.

But on the 23d of *December*, *Mico* gave notice, that the logwood had been aſſigned to him by *Watkins*, who was greatly indebted to him on account, and he claimed a property in the logwood as a ſecurity for his debt, and required the plaintiff to pay no more money without his order.

About the 5th of *January* 1751, *Watkins* became a bankrupt, and the defendants *Wilcox*, &c. were choſen his aſſignees, and his eſtate, &c. were aſſigned to them.

And

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And upon the plaintiff's applying to the aſſignees, and to *Mico*, for delivery of the remainder of the logwood, it was agreed, the ſame ſhould be delivered, without prejudice to their reſpective claims.

On both claiming, this bill was brought, that the defendants might interplead.

The defendants, the aſſignees, by their anſwer, admit the above facts, and ſtate, that the ſaid logwood with great quantities of the ſame kind, were conſigned by *Watkins* the bankrupt, on his own account, to the defendant *Mico*, by a ſhip called the *Britannia*, which arrived in 1750; that *Watkins* not being in *London*, Capt. *Jefferys* acquainted *Mico* with the arrival of the ſhip, and thereupon *Mico* ordered the logwood to be unloaded, and hired a warehouſe belonging to *Wilkinſon*, to lodge it in, and *Mico* ordered *Hudſon* to ſell the ſame, under a letter of attorney he ſaid he had from *Watkins*; before the logwood was ſold, *Watkins* arrived, and acted in all reſpects as owner, and proprietor; and from the 15th of *November*, *Mico* in no manner acted otherwiſe, than under the direction of *Watkins*, and *Watkins* underwrote an order, for the payment by the plaintiff, to *Hudſon*, and therefore the aſſignees inſiſt, that *Mico* had no lien on the money, and that it ought to be paid to them.

The defendant, *Mico*, by his anſwer ſays, that in 1746, he became acquainted with *Watkins*, who from that time, employed him as his agent, and in conſequence divers conſignments were from time to time made between them.

That about 27th *April* 1747, *Watkins* executed a general letter of attorney, to receive all monies that

might be due to him, for goods ſold, and delivered, or otherwiſe.

That till the bankruptcy of *Watkins*, he tranſacted his affairs, and received ſeveral cargoes of logwood, &c. which he ſold, and received the money, and placed the ſame to his account, with commiſſion and charges, &c.

That in the courſe of theſe tranſactions, viz. about *April* 1747, *Watkins* became indebted to him in 840 *l.* and that in the ſame month, *Watkins* being in *England*, and wanting 400 *l.* applied to him, *Mico*, to advance the ſame, promiſing to make ſome conſiderable remittances; that relying on thoſe promiſes, he, *Mico*, advanced the 400 *l.* and afterwards paid ſeveral conſiderable ſums for *Watkins*.

That at the time of the conſignment to him, *Mico*, by the *Britannia*, *Watkins* was indebted to him in 2,000 *l.* and in conſequence of a letter from *Watkins*, he made an inſurance on the ſaid ſhip, before her arrival, and admits the arrival of the ſhip, and his order to *Hudſon*, to ſell the logwood, the ſale and the delivery of part.

The queſtion in the cauſe was, whether the parting with the property by a conſignee, was parting with his lien on the things conſigned.

Being of a matter of great conſequence in trade, the cauſe ſtood over for this day, when by deſire of the Lord Chancellor, Sir *William Baker*, *Kingſly Bethel*, Aldermen of *London*, and merchants; and Mr. *Tonnercau*, and Mr. *Wilby*, merchants, all of eminence in the mercantile line, attended in Court to anſwer queſtions, put to them by his Lordſhip.

Lord

Cruger v. *Wilcox.*

Lord *Hardwicke* C.—The queſtion in this cauſe, ariſes on a commiſſion of bankruptcy.

In a bankruptcy, this Court as well as Courts of law, endeavour to level creditors.

But if a perſon hath a ſpecific lien, it is ſtill preſerved to him, notwithſtanding any wrong act of the debtor; and Courts have made large ſtrides to preſerve that lien.

But whether the Court ought to do ſo in the preſent caſe, is to be conſidered.

The queſtion is, whether the defendant *Mico*, is entitled to a ſpecific lien, and conſequently to ſatisfaction, out of the money in the hands of the broker; or out of the goods in the hands of the purchaſer.

Being a matter of conſequence, I thought it neceſſary to have the opinion of merchants: What lien a conſignee gains, on goods conſigned to him. And if there were in this caſe originally a ſpecific lien, whether the defendant loſt it by any act. Four merchants of eminence have been examined, both as witneſſes in the cauſe, and in Court. And they all agree, that if, between a factor here, and a merchant abroad, there hath been a general courſe of dealings, the *conſignee* gains a *right* to retain the ſhip, not only for cuſtom, freight, &c. but alſo for the balance of a general account: That a ſhip and money are the ſame thing in account.

Upon the caſe of an action of trover, if a conſignor goes to his conſignee, and ſays, here is your duty, commiſſion, and freight, deliver me the ſhip &c. I do not know, that he would recover.

But

Cruger v. *Wilcox.*

But then a bill will lie.

Hath *Mico* done any thing to part with his lien? I think he hath.

The aldermen and the other merchants alſo agree, that parting with the goods, is parting with the lien.

And the law ſays, that parting with poſſeſſion, is departing from the lien.

I am therefore of opinion it is much ſafer for trade, to hold it ſo in this caſe; and let the plaintiff pay the money to the aſſignees, and *Mico* come in as a creditor under the commiſſion.

Penn v. Lord *Baltimore.*

12 Feb. 1755.

Defendant cannot demur, having obtained an order for time to anſwer only.

THE defendant had obtained an order, for a month's time, to anſwer only; not having anſwered on the 8th *February* 1755, he applied for, and obtained, an order for time to plead, anſwer, and demur, not demurring alone.

On this day, (12th *February*, 1755), Mr. *Yorke*, Mr. *Wilbraham*, and Mr. *Forreſter* moved to diſcharge the order.

Mr. *Hoſkins* appeared for the defendant.

Lord *Hardwicke* C. directed the order to be varied, ſo far as it gives leave to the defendant to demur.

15 Feb. 1755.

In the matter of Count *Haſlang*.

Arreſting the ſervant of a foreign miniſter, though not lodging in his houſe, held to be a breach of privilege, within the Stat. of 7 Anne

Lord Chancellor.
Lord C. J. of the Court of King's Bench.
Lord C. J. of the Common Pleas.

THIS was brought before the Court, upon a complaint of Count *Haſlang*, for arreſting his ſervant.

Curia.—We ſit here in execution of a ſummary juriſdiction, veſted in us by the ſtatute of the 7th of Queen *Anne*, and whatever doubts were made before this act of parliament, as to the privileges of ambaſſadors, they are cleared by this act; and the firſt clauſe is declaratory, that the inſulting of ambaſſadors, &c. was contrary to the laws of nations, and that ſuch offender was a violator of the laws of nations, and a diſturber of the public repoſe.

The preſent complaint, is for an offence againſt this act of parliament, by the arreſt of *Thomas Threlkeld*, a domeſtic ſervant of Count *Haſlang*, Miniſter Plenipotentiary of the Elector of *Bavaria*, and for uſing very opprobrious, and reproachful words of the miniſter.

As to the words, we have no juriſdiction concerning them, but they aggravate the breach of privilege.

It is neceſſary to prove in this caſe, that the perſon arreſted, was a domeſtic ſervant of the miniſter, and properly entered, and regiſtered, according to the act, and that the arreſt was committed in breach of the act.

And

In the matter of Count *Haſlang*.

And we are of opinion, there is ſufficient proof of the regiſtering of *Threlkeld*, in the ſheriff's offices, before the arreſt.

The next conſideration therefore is, whether he was a domeſtic of the miniſter or not, and it is not ſufficient merely to retain a perſon, or call him ſo, unleſs he is proved *reverâ*, to be a domeſtic ſervant.

Here it is proved, by *Threlkeld* and *Morice*, (who is ſecretary to the miniſter), that *Threlkeld*, was retained as meſſenger to Count *Haſlang*, to carry letters and meſſages; that the contract was for 25 *l.* a-year wages, beſides 25*l.* a year for board wages; and *Threlkeld* ſwears, and *Morice* concurs with him, that he (*Threlkeld*) hath been always duly paid the wages, and given receipts for the ſame; and that he took ſuch wages, and retained the ſame to his own uſe; and there being no evidence on the other ſide to impeach this, there is no doubt of his being ſervant to this miniſter.

It is objected, this is improbable, but no witneſs is examined to diſcredit the above witneſſes, or to prove the fact is not ſo; or that it is colluſive, fraudulent, or illuſory, and we muſt judge *ſecundum allegata, et probata*.

It is further inſiſted, that the proof in this caſe is not ſufficient, becauſe there muſt be domeſtic ſervice, and the perſon muſt be reſident at the houſe of the miniſter; but that hath often been over-ruled, and it is not neceſſary, he ſhould lodge, or reſide in the houſe of the miniſter; nor doth his lodging out of the houſe, make him ceaſe to be a domeſtic ſervant.

The conſequence, therefore is, that this perſon, *Thomas Randal*, hath been guilty of a breach of this act of parliament.

In the matter of Count *Haſlang.*

As to the nature of his puniſhment, that is diſcretionary; and if in this caſe, the man had been guilty of the arreſt barely, his ſubmiſſion might perhaps have been accepted; but here the ſcurrilous and abuſive terms were probably the reaſon his ſubmiſſion was not accepted; and they greatly aggravate the offence, and call for animadverſion; and we are of opinion, we are bound in juſtice to commit this man, and declare him to be a violator of the laws of nations, and a diſturber of the public repoſe; and therefore he is to be fined in ten marks, and impriſoned for three months in Newgate, and until payment of his fine, and he within that time, to be carried by the ſheriff to the houſe of Count *Haſlang*, with a paper on his breaſt, declaring his offence.

[Note.—On the firſt coming on of this matter to be heard, the Attorney General ſubmitted it to the Court, whether they would admit affidavits as evidence, or examine the witneſſes perſonally; and the Court determined the witneſſes to be examined in perſon.

The Lord Chancellor firſt gave his opinion, and the two Chiefs did afterwards declare their concurrence with his Lordſhip. J. D.]

Ex parte *Winde.*

4 March 1755.

An infant being found a mortgagee, within the ſtatute of the 7th of Queen *Anne*, and one third of the mortgage money belonging to the infant; it was ordered by Sir *John Strange* M. R. to be paid into the Bank, on his account.

Sinclair

Sinclair v. *James.*

31 May 1755.

Depoſitions publiſhed notwithſtanding they were taken during an abatement.

THE plaintiff *Elizabeth*, lived at *Charles Town, South Carolina*, having brought her bill by her next friend; and having afterwards intermarried without his knowledge, he upon the cauſe being at iſſue, by virtue of an order for that purpoſe, ſued out commiſſions for an examination of witneſſes in *South Carolina*, and *New York*, which were executed, and the commiſſions returned.

A queſtion was made, whether the depoſitions could be publiſhed, as they were taken pending the abatement.

Lord *Hardwicke* C.—Let the depoſitions be publiſhed, and read, notwithſtanding the intermarriage of the plaintiffs, the fact not being known here, at the time the commiſſions *iſſued*.

Attorney General v. *Bentham.*

3 July 1755.

A trial at law directed by conſent, to try the right of ſtopping up, or obſtructing lights, and a view to be had, to ſee if the new buildings are on old foundations.

ON motion for an injunction to reſtrain the defendant *Bentham*, from erecting his edifice ſo as to obſtruct the lights of the relator's houſes:

It was by conſent ordered, that the parties ſhould proceed to a trial at law, in the Court of King's Bench, in an action upon the caſe, to be brought againſt the defendant, for ſtopping up or obſtructing the lights of the two meſſuages, or houſes in queſtion; and on the trial, the defendant is to admit the relator to have been at the time of the committing of the nuiſance alledged, ſeiſed, and poſſeſſed of the houſe in queſtion; and the relator is to admit the

Attorney General v. *Bentham.*

defendant was ſeiſed and poſſeſſed of the buildings in the pleadings mentioned to have been pulled down by him, before they were ſo pulled down; and injunction to ſtay the erecting of any buildings, whereby the lights may be ſtopped, until after the trial; and after trial, liberty to apply touching coſts, and further directions; and by conſent, Mr. *Blagden*, and Mr. *Dance*, to be permitted to have a view of the premiſes in queſtion, and particularly to inſpect, whether there were any, and what, old foundations at or near the ſpot, where the new wall is erected.

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31 July 1755. Anon. 2 Veſ. 361, S. C.

Intereſt refuſed on arrears of annuities; though intereſt were reſerved by the decree.

Bignal v. *Brereton*, et è contra.

(Reg. Lib. A. fol. 554.)

BY the decree dated 20th *March*, 1750, it was referred to Maſter *Eld*, to take an account of what was due to the plaintiffs in the ſecond cauſe, for principal, and intereſt on her two legacies of 500 *l.* and 20 *l.* and alſo an account of what was due to the defendant *Sharpleſs*, for principal, and intereſt on his mortgage, and to tax him his coſts.

And the Maſter was alſo to take an account of what was due to the plaintiffs, for the arrears of their reſpective annuities, accrued ſince *Michaelmas* 1741, and by conſent of the mortgagee, the eſtate was to be ſold, and directions were given for payment of what ſhould be found due on the mortgage, on the legacies, and for the arrears of the ſaid annuities; and the conſideration of intereſt, on the arrears of the plaintiff's annuities was reſerved.

On 16th of *May* 1755 the Maſter certified amongſt other things, that he had taken an account of what was due for the arrears of the plaintiffs reſpective annuities, from *Michaelmas* 1741, being thirteen years and an half; and that ſuch arrears amounted to 337 *l.* 10 *s.*; the Maſter then ſtated, that the eſtate had been ſold purſuant to the decree; and that the purchaſe money had been laid out in Bank annuities, in the name of the Accountant General. *Bignal* v. *Brereton*, et è contra.

On the 21ſt *July* 1755, the cauſes came on for further directions, and as to the matter of intereſt, reſerved by the decree.

But Lord *Hardwicke* C. would not give intereſt on the arrears of the annuities; but only directed the Maſter to compute *ſubſequent* intereſt, on ſuch of the parties debts, and legacies, whereon intereſt had already been computed.

Mildred v. *Neate*. 3 July 1755.

Injunction to ſtay proceedings on a foreign attachment.

THE plaintiff had a conſignment of goods from *Philadelphia*, with a letter directing him to ſell the ſame, and after deducting the charges, &c. to apply the money to ariſe thereby, in payment of what was due to ſeveral perſons therein named, (defendants in this cauſe), as far as the ſame would extend rateably: the defendants *Neate* and another, two of the creditors, upon the arrival of the goods in the *Thames*, and whilſt on board the ſhip, ſerved the plaintiff with a foreign attachment, and inſiſted they had thereby got a prior lien.

Mildred v. *Neate.*

The plaintiff filed a bill, (not as an interpleading bill), for an injunction; and upon his application, an injunction was ordered.

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12 July 1755.

Auſten v. *Hinton.*

(Reg. Lib. A. fol. 533.)

BILL by creditors of the teſtator: after they had examined their witneſſes, they diſcovered the heir at law, ſuppoſed to be dead, was living: he was made a defendant: publication not having paſſed, was enlarged, and liberty given to the heir at law, an infant, to croſs-examine the plaintiff's witneſſes, and for the plaintiffs to read the depoſitions already taken againſt him; and they were alſo at liberty to re-examine their witneſſes againſt the ſaid infant.

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12 July 1755.

Carrington v. *Holly.*

Although a cauſe be brought to a hearing, and an iſſue directed, till the iſſue is tried, and there hath been a determination, let the cauſe be in what ſtage it may, the plaintiff may upon motion, diſmiſs his bill, upon payment of coſts.

THE plaintiff filed his bill, to eſtabliſh his right to eſtates: Upon hearing the cauſe, an iſſue was directed. The plaintiff being adviſed, he had not made a caſe by the bill, and the matter put in iſſue, to ſupport his claim, applied by *motion*, and obtained an order of courſe, to diſmiſs his bill, upon payment of coſts.

The defendant applied the above day, to diſcharge the ſaid order for irregularity, upon the ground, that the cauſe having been regularly brought on to a hear-

ing, the bill could not be diſmiſſed, but on a ſolemn judgment. *Carrington v. Holly.*

Lord *Hardwicke* C.—There hath not been any determination; the directing of an iſſue, is merely to ſatisfy the conſcience of the Court, prefatory to their giving judgment: That iſſue hath not been tried, and till there hath been a determination, I hold a plaintiff may in any ſtage of the cauſe, apply to diſmiſs his bill, upon payment of coſts; and therefore take nothing by the motion.

But his Lordſhip ſaid, had there been a decree, it would have been otherwiſe; for all parties were intereſted in a decree, and any party might take ſuch ſteps, as he might be adviſed to have the effect of it.

So likewiſe, ſaid his Lordſhip, it would have been, had the iſſue been tried, and a verdict in favour of the defendant; the defendant might have ſet the cauſe down on the equity reſerved, in order to have the bill diſmiſſed, upon the ſolemn judgment of the Court, ſo as to make the order of diſmiſſion pleadable. The language of the order, directing the iſſue, ſhews it; for the Court, after it directs the iſſue, reſerves the conſideration of coſts, and of all further directions, until after the trial of the iſſue, when any of the parties are to be at liberty to apply to this Court, as they ſhall be adviſed.

Chandler v. *Gaſcoyne.* 31ſt Oct. 1755.

An injunction granted in the firſt inſtance, to ſtay proceedings in the Spiritual Court.

Stevens

1 Nov. 1755.

Stevens v. *Long*.

REFERENCE to a Maſter, to look into and certify, whether proceedings were regular, or not; the Maſter reported them irregular; upon exceptions to the report, they were held to be regular.

The plaintiff thereupon, obtained an order to tax his coſts occaſioned by the reference.

The defendant applied this day, to diſcharge the order, he having had the Maſter's judgment in his favour; ſo that there was judgment againſt judgment.

Lord *Hardwicke* C. thought the application founded, and diſcharged the order.

28th Nov. 1755.

Winthorp v. Royal Exchange Aſſurance Company.

THE defendants had obtained the common order for the plaintiffs to give ſecurity to anſwer coſts; application this day to diſcharge it, for that one of the plaintiffs lived in *England*, whom the defendants might always follow for the coſts.

Lord *Hardwicke* C. ſaid, as one of the plaintiffs lived in *England*, who would be always liable to the coſts, and as there was no evidence before him of the inability of ſuch plaintiff to anſwer them, the order was improper; and therefore his Lordſhip diſcharged the order.

Whitehear

Whitehear v. *Hughes.* 28th Nov. 1755.

If a plaintiff files a bill, to revive after a decree, and neglects to revive, on the time for the defendant's anſwering being out, the defendant allowed to revive, and carry on the decree under the plaintiff's bill.

AFTER a decree, whereby the plaintiff was to redeem in ſix months, or the bill to be diſmiſſed, and a report of what was due to the defendant, for principal, intereſt, and coſts, the ſuit abated, and the plaintiff filed a bill of revivor, but neglecting to apply for an order, that the ſuit ſhould be revived, although the defendant's time for anſwering was out; the defendant on the above day moved, (under the bill of revivor filed by the plaintiff), that the ſuit and proceedings might be revived, and that the Maſter might compute ſubſequent intereſt, and tax the defendant his ſubſequent coſts, and appoint a new time, and place for payment.

A doubt aroſe, whether the defendant could properly revive under a bill filed by the plaintiff, without exhibiting a bill for the purpoſe.

Lord *Hardwicke* C.—As the cauſe is in that ſtate, that either party might have filed a bill to revive the ſuit, and as the plaintiff hath neglected to revive, I do not ſee any inconvenience in permitting the defendant to revive, when by filing a bill of revivor, there is no doubt, but that he may carry on the decree under the plaintiff's bill; and I will put this caſe:—Suppoſe an abatement happens by the death of a party, and the party dying deviſes his real eſtate, and appoints his deviſee, executor of his will; the plaintiff cannot revive in the common way, but he muſt bring a ſupplemental bill, in nature of a bill of revivor, and ſet the cauſe down, to have a decree, for carrying on the former decree, and accounts.

And

Whitehear v. *Hughes.*

And as the defendant may in that caſe, on neglect of the plaintiff, ſet down the cauſe to be heard, at his own inſtance, I do not ſee any reaſon why the defendant may not upon the plaintiff's neglect, revive in this caſe; and therefore take it according to the notice.

9th Dec. 1755.

The plaintiff ordered to pay the defendant 7 l. extra the 20 s. for the length of the amendments.

Freke v. *Culpepper.*

(Reg. Lib. B. fol. 30.)

THE plaintiff after amending his bill four ſeveral times, applied again, and obtained the common order to amend, on payment of 20 *s.* coſts, and amended accordingly; the amendments being long, and occaſioning a new ingroſſment, of which the defendant was under the neceſſity of taking a copy, whereby he was put to conſiderable expence, he applied the above day, by Mr. *Sewel* and Mr. *Martin*, his Counſel, that the order for the amendment might be diſcharged; which was oppoſed by Mr. *Yorke*, and Mr. *Capper*, on behalf of the defendant.

Lord *Hardwicke* C. would not diſcharge the order, but directed the plaintiff to pay the defendant, 7 *l.* for the coſts, occaſioned by the fifth amendment, beyond the 20 *s.*

Patterſon

Patterſon v. *Slaughter.*

19 Dec. 1755.

Ambl. 292. S. C.

(Reg. Lib. A. fol. 230.)

LIBERTY given to the defendant, to amend his anſwer, by inſiſting on his title as purchaſer, inſtead of heir at law, having diſcovered his title after putting in his anſwer.

Paget v. *Nicholſon.*

22 Dec. 1755.

A BILL of fees and diſburſments for agency buſineſs ordered to be taxed.

Counteſs of *Londonderry* v. *Cornthwaite.*

26 Jan. 1756.

Serjeant at Arms directed to go againſt the defendant for want of his anſwer, on petition; he having conſented the Serjeant at Arms ſhould go, in caſe he did not anſwer.

UPON application of the defendant for further time, time was given, upon his entering his appearance with the Regiſter, conſenting that the Serjeant at Arms ſhould go againſt him, in caſe he did not put in his anſwer by the time given. He anſwered: The anſwer was reported inſufficient; and he was ſerved with a ſubpœna, to make a better anſwer; but neglecting to anſwer, the plaintiff applied by *petition*, that the Serjeant at Arms might go.

Lord *Hardwicke* C. doubted, whether the ſame could be granted on a petition; but after ſearch, many precedents being produced, his Lordſhip ordered the Serjeant at Arms to go.

Gaſon

27 July 1756.

Gaſon v. *Garnier.*

THE defendant becoming impaired in his mind, after the decree, had a guardian appointed him, by whom he might produce books, &c.

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23 Feb. 1756.

Lutwych v. *Southin.*

Fine levied *pendente lite*, not to be ſet up at the trial of an ejectment.

DURING the pendency of the ſuit a fine was levied, and deeds executed, declaring the uſes of it:—On hearing the cauſe, the bill was retained for twelve months, with liberty for the plaintiff, to bring an action of ejectment, in order to try the right to the lands.

The plaintiff afterwards coming to the knowledge of the fine, re-heard the cauſe, in order to prevent the fine, and non claim, being ſet up at the trial.

The caſes cited, were *Burgoyne* v. *Hatton*, 5th *Dec.* 1738; *Selfe* v. *Madox*, 1 *Vern.* 459; *Sorell* v. *Carpenter*, 2 *P. Wms.* 482.

Sir *Thomas Clarke* M. R.—Let the fine and deeds be not ſet up, nor any non claim ariſing from thence, be inſiſted on.

Snell

Snell v. *Hyat.* Hil. 1756.

ON application of a defendant, a lunatic, ſtating that his committee was one of the plaintiffs, it was referred to a Maſter, to appoint a guardian of the lunatic, to anſwer, and defend the ſuit.

Dean v. *Abel.* 7 March 1728.

THE defendant by conſent, was to appear *gratis* at the hearing, and pray no day over; at the hearing he made default, and a decree was pronounced; from the decree he appealed to the Houſe of Lords; but their Lordſhips without going into the merits, diſmiſſed the appeal, for that it was in the nature of an original hearing.

Perkins v. *Hamond.* 5 June 1746.

THE defendant, the infant, being brought up by the Meſſenger to have a guardian aſſigned him, to anſwer and defend the ſuit, it was prayed, that he might not be diſcharged, and that he might pay the coſts.

Lord *Hardwicke* C. ſaid, an infant could not be kept in cuſtody, after a guardian was aſſigned him; and that an infant, defendant, pays no coſts of a contempt: the plaintiff always pays the Meſſenger.

Bray

30 June 1756.

Bray v. *Bulkby.*

DEPOSITIONS of witneſſes, examined to the credit of other witneſſes, referred for ſcandal, and impertinence.

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6 July 1756.

Smith v. *Fry.*

BEFORE the cauſe was heard, the plaintiff became inſolvent; at the hearing, coſts were decreed; the plaintiff applied to be relieved againſt ſuch coſts, as incurred before his inſolvency; which the Court refuſed, ſaying, that though he could not pay, they would be a debt on his eſtate.

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1 July 1756.

Flowerday v. *Collet.*

ONE *John Delaport* had been examined as a witneſs on the part of the plaintiff; before he was croſs-examined, he ſecreted himſelf.

On motion, Sir *Thomas Clarke* M. R. ordered the plaintiff, in a fortnight after notice, to procure the ſaid *John Delaport* to attend, and be croſs-examined, or in default, that his depoſitions taken on the part of the plaintiff, ſhould be ſuppreſſed (*a*).

(*a*) Similar order made by Lord Hardwicke C. in Gaſon v. Granger, 1753.

Hall

Hall v. *Darney.*

5th Aug. 1756.

If a plaintiff obtains an injunction upon the defendant's being in contempt for want of his anſwer, the defendant is not entitled to an order to diſſolve the injunction, unleſs cauſe, barely upon putting in his anſwer, but he muſt alſo have paid the coſts of the contempt.

THE defendant being in contempt for want of his anſwer, the plaintiff obtained the common order for an injunction till anſwer, and further order.

On the 27th of *July* 1756, the defendant, upon the uſual ſuggeſtion, that he had put in his anſwer, obtained the common order to diſſolve the injunction, unleſs cauſe.

On the 5th of *Auguſt* 1756, the plaintiff came to ſhew cauſe againſt the order, and for cauſe, alledged, that though the defendant had put in an anſwer, yet that the defendant *had not paid the coſts of his contempt*, and therefore the order was irregularly obtained.

Lord *Hardwicke* C.—By ſhewing cauſe, you admit the anſwer: the proper way is, for the plaintiff to move to diſcharge the order for irregularity; therefore take nothing by your preſent motion.

Moleſworth v. *Opie.*

6 Aug. 1756.

THE eſtate in queſtion having, purſuant to the decree in the cauſe, been ſold before the Maſter, Mr. *Lienbrey*, a ſolicitor of this Court, on behalf of one *George Beauchamp*, obtained an order to open the bidding, and the beſt bidder was to depoſit 200*l.*

The Maſter proceeded to re-ſell the eſtate, when Mr. *Lienbrey* ſet up the *Opies*, as ſham bidders, and the Maſter made a report, of their being the beſt bidders.

They not proceeding, upon application of the plaintiff, Lord *Hardwicke* C. diſcharged the report of their

Molesworth v. *Opie.*

being the beſt bidders; and it being admitted by *Lienbrey*, there was no ſuch perſon as *George Beauchamp*, his Lordſhip declared, Mr. *Lienbrey* was to ſtand as the beſt bidder, at the price at which he opened the bidding; and the Maſter was to make a report of it accordingly, and any of the parties were at liberty to take out ſuch report; and Mr. *Lienbrey* was to pay unto the the plaintiff, 40*s.* for the coſts of the motion.

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10 Aug. 1756.

Vallence v. *Weldon.*

Reference to the Maſter to review his report in order to give liberty to take objections for the purpoſe of grounding exceptions.

APPLICATION to take exceptions to a report, although no objections were left with the Maſter.

Sir *Thomas Clarke* M. R.—It is a practice long eſtabliſhed, not to admit of exceptions after report, and no objection taken to the report: *Jacobſon* v. *Hawkins*, before Lord *Hardwicke* C. and *Gregor* v. *Moleſworth*, before Lord *Hardwicke* C.; but if the Court ſees reaſon to be diſſatisfied, it may refer it to the Maſter to review his report: therefore refer it to the Maſter to review his report, and let the parties be at liberty to take objections to the report; the application was by petition, but it was thought more regular to move it, and therefore liberty was given to move the matter of the petition.

Hendry

Henary v. *Key.*

22 Nov. 1756.

(Reg. Lib. B. fol. 82.)

ON the 31ſt of *March* 1754, *Eliſha Brown* died: the next day *Francis Brown*, his brother, his heir at law, and ſole next of kin, depoſited in the hands of the plaintiff for ſafe cuſtody 111 *l.* and ſome ſilver tea ſpoons, &c. A very ſhort time afterwards, the ſaid *Francis Brown* died inteſtate; upon his death, the defendants ſeverally demanded the above particulars, and commenced an action againſt the plaintiff; the plaintiff thereupon filed his bill of interpleader, and on obtaining an injunction, paid the 111 *l.* into the Bank, with the privity of the Accountant General, ſubject to the order of the Court (*a*).

On the 22d of *November* 1756, this cauſe was heard at the requeſt of the defendant *Key*: the plaintiff was ordered his coſts of the ſuit, and at law, out of the caſh in the Bank; the reſidue with the ſpoons was ordered to the defendant *Key*; and the other defendants, who could not ſupport their claim, were ordered to pay the defendant *Key* his coſts, and the coſts the plaintiff ſhould be paid under the above direction.

Plaintiff in an interpleading bill, if he conduct himſelf properly, ſhall have his coſts from the defendant, who ſucceeds, and ſuch defendant ſhall have them over again from the defendant who fail's in his claim, with his own coſts.

(*a*) The plaintiff in an interpleading bill muſt compel the defendants to anſwer: He muſt reply, and have a ſubpœna to rejoin, in order that the defendants may examine witneſſes. J. D.

The giving of the plaintiff his coſts, was ſtrongly argued againſt; it was ſaid the bill was for his accommodation, and that there was not an inſtance in which a plaintiff in an interpleading bill had his coſts; but it being ſaid, there was a ſimilar decree by Lord *Talbot* C. his Honour directed the decree to be ſuſpended, until it was ſearched for; the name of the cauſe is, *Bladwell* v. *Reeves*, 6 *Aug.* entered Reg. Lib. B. 1733, fol. 461.

It ſhould ſeem, that until the time of Lord Chief Baron *Skinner*, the Court of Exchequer had not given coſts to a plaintiff in an interpleading bill; for ſuch

Hendry v. *Key.*

costs being preſſed before that Court, his lordſhip ſent to me to know if it had ever been done in this Court, and upon ſending him the above two caſes, and another in Lord *Anſon* v. *Connor*, 5th *June* 1753, the Court of Exchequer, as I was informed, gave the plaintiff his coſts; and Lord *Thurlow* C. in *June* 1791, in a cauſe *Dowſon* v. *Hardcaſtle*, the bill being brought by a wharfinger with whom ſome *Ruſſian* tallow was depoſited, and which was claimed by the different defendants, gave coſts in the ſame manner, as Sir *Thomas Clarke* did in the above caſe of *Hendry* and *Key*. In *Brymer* v. *Buchanan*, the plaintiff not having conducted himſelf properly, had not his coſts, and it was ſtrongly urged, that he ſhould pay coſts. J. D.

18 Dec. 1756.

Philips v. *Johnſon.*

EXCEPTIONS being ſhewn for cauſe to continue an injunction, the common order was made, to refer the exceptions, and to procure the report in four days, or the injunction to be diſſolved without further motion; which not being obtained, the injunction was of courſe diſſolved; after which the plaintiff obtained an order to refer the exceptions to the defendant's anſwer; and upon ſuch exceptions, the anſwer was reported inſufficient: the plaintiff gave notice to revive the injunction, and moved accordingly, which was granted; Lord *Hardwicke* C. at the ſame time ſaying, it was of courſe.

Between the years 1750 and 1756.

Blunt v. *Clitherow.*

LORD *Hardwicke* C.—No precedent hath been found where a teſtator having directed the reſidue of his perſonal eſtate to be laid out in a purchaſe of lands, and ſettled to the uſe of daughters and their heirs, as tenants in common, with croſs remainders, that the reſidue

reſidue hath been divided, and laid out in ſeparate purchaſes, for the conveniency of each daughter, and yet be ſettled to the uſes of the ſettlement; and therefore his Lordſhip, after decreeing the neceſſary accounts, directed the reſidue of the perſonal eſtate to be laid out in land, and ſettled agreeably to the limitation in the will. *Blunt* v. *Clitherow.*

Palmer v. *Palmer.* 21 Jan. 1757.

MONEY, under the particular circumſtances of the caſe, ordered to be paid under a letter of the wife, who was in the *Eaſt Indies*; although upon enquiry, and ſearch, not found to have been ever ordered before.

Rees v. *Manſel.* 26 Jan. 1757.

AFTER the defendant had anſwered, the ſuit abated, and the plaintiff filed a ſupplemental bill, and bill of revivor againſt the defendant, and ſerved him with a ſubpœna to appear, and anſwer: having ſtood out all proceſs of contempt to a ſequeſtration, for want of his anſwer, the plaintiff obtained an order, for the Clerk in Court to attend at the hearing with the record of the bill, in order that it might be taken *pro confeſſo*. It being afterwards diſcovered the defendant was a priſoner in the Fleet, he was ſerved with a ſubpœna to hear judgment in the original cauſe, as he had anſwered

Rees v. *Manſel.*

the bill in that cauſe: upon the cauſe coming on to be heard, the defendant made default.

The ſupplemental bill was decreed by Sir *Thomas Clarke* M. R. to be taken *pro confeſſo*; and the decree made, was to be binding on the defendant, unleſs he ſhewed cauſe to the contrary.

Ex parte *Jordan.*

21 Jan. 1757.

DISPUTE concerning the guardianſhip of the perſon and eſtate of an infant, appointed by will, there being *no cauſe in Court.*

The teſtamentary writings, appointing the guardian, not having been executed according to the ſtatute of 12th of *Charles* 2d. Sir *Thomas Clarke* M. R. declared, the appointment to be ineffectual.

Rogers v. *Earl.*

22 Feb. 1757.

BILL to rectify a miſtake in ſettlement; parol evidence offered to prove it, which was objected to.

Parol evidence read to prove a miſtake of a ſolicitor in taking inſtructions for a ſettlement.

Sir *Thomas Clarke* M. R.—One branch of the juriſdiction of this Court is to relieve againſt fraud, truſts, and miſtake; and parol evidence is admitted to rebut an equity, as it was in *Lamplugh* v. *Lamplugh*, 1 *P. Wms.* 111. 2 *Eq. Ca. Abr.* 415. *S. C.* *Joynes* v. *Statham*; I do not mention *Brown* v. *Selwyn*, *Ca. Temp. Talb.* 240. 4 *Bro. P. C.* 179. *S. C.* becauſe there was a difference in opinion, between two judges of great character; this is one head where parol

parol evidence is admitted: The other is, where parol evidence is admitted, to make out equity: As to the head of miſtake, I do not give a poſitive opinion, but I do not think this Court hath relied upon parol evidence ſingly; it muſt be corroborated by other evidence, as in *Pritchard* v. *Quincent* (*a*), and *Hill* v. *Wiggan*: It is, however, leſs neceſſary to enumerate the various caſes under this head, becauſe there is one in point, *Young* v. *Young*, *February* 14, 1750, the plaintiff married *Lucy* a defendant, and an infant; the huſband ſtated, or drew by way of inſtructions, to his attorney, what the wife's fortune then was, and agreed to add as much to be ſettled in ſtrict ſettlement, and likewiſe ſtated, that the intended wife had a proſpect of an additional fortune, to which he agreed, provided it did not exceed 1000*l.*, to add a like ſum, to be likewiſe ſettled in ſtrict ſettlement, and he to have the exceſs: the ſettlement was prepared according to the inſtructions; but the ſolicitor having in the margin of the draft, added double the ſum, a ſettlement was prepared and executed, according to that miſtake: In that caſe, parol evidence was admitted to prove the miſtake, and ſo it ought to be read in the caſe before me.

Rogers v. *Earl.*

(*a*) Ambl. 147.

Coriton v. *Helliar*, *Harvey* v. *Harvey*, 24th of *November* 1739, and *Uvedale* v. *Halfpenny* (*b*), were cited in the courſe of the cauſe.

(*b*) 2 P. Wms. 151. 2 Eq. Ca. Abr. 718. S. C.

4 March 1757.

Bethuen v. *Bateman*.

If an anſwer be reported inſufficient, and the plaintiff obtain an order to amend, and that the defendant may anſwer the amendments and exceptions at the ſame time, unleſs he ſerve the order before the defendant anſwers, the defendant may anſwer the exceptions only.

ORDER for an injunction, until anſwer and further order: the defendant anſwered; the plaintiff took exceptions: On the 11th of *November* 1756, the anſwer was reported inſufficient; on the 12th of *November*, the defendant put in a further anſwer; on the ſame day the plaintiff obtained an order to amend, and for the defendant to anſwer the exceptions and amendments at the ſame time, and ſerved the order.

The defendant applied to diſcharge the order, for irregularity, and for that it was obtained upon a falſe ſuggeſtion.

It ſtood over ſeveral times, until this day, the 4th *March* 1757, for the conſideration of the Court.

Sir *Thomas Clarke* M. R.—This matter ariſes from a trial of ſkill between the parties, in point of jockeyſhip: The plaintiff ſenſible his bill is without equity, to ſupport his injunction, wants to bolſter it up by an amendment; the defendant aware of his intention, wiſhes to prevent it, by putting in a further anſwer immediately, upon his anſwer's being reported inſufficient; the propriety of which, is the queſtion now before me.

Had the plaintiff obtained the order to amend his bill, and for the defendant to anſwer the amendments and exceptions at the ſame time, and had ſerved the order before the defendant had anſwered, the defendant muſt have anſwered both; for the original bill ſo amended, is but one record; and ſo it was held by Lord *Hardwicke* C. in *Mayne* v. *Hochin*, 27 *April* 1754(*a*), and I am of opinion, the defendant may put in his

(*a*) Supr. 255.

his anſwer, when he thinks fit; he hath done it; and therefore, that part of the order, which directs the defendant to anſwer the exceptions, is wrong, and let it be diſcharged.

Bethuen v. *Bateman.*

Robinſon v. *King.*

4 March 1757.

BILL by a ſingle bond creditor, to be paid out of the perſonal and real eſtate of *Thomas Fawcet*, the inteſtate, againſt his perſonal repreſentative, and his heir at law.

Bill by a ſingle bond creditor for payment of what was due to him out of the real aſſets deſcended. Vid. Walter v. Goring, infra.

The perſonal eſtate being inconſiderable, and the adminiſtrator being a bankrupt, the plaintiff at the hearing, waived an account of it; and therefore Sir *Thomas Clarke* M. R. directed the real eſtate deſcended to be ſold; and the infant heir, to join in the ſale at twenty-one, and the purchaſer to hold and enjoy in the mean time, and the money to ariſe by the ſale, to be applied in payment of what ſhould be found due to the plaintiff for principal and intereſt on his bond, and for coſts; and if not ſufficient, an account of the rents and profits was directed, and thoſe to be applied; but this was to be without prejudice to any remedy the perſons entitled to the real eſtate of the inteſtate, might be entitled to, in exoneration, and aid of the real eſtate (*a*).

(*a*) The minutes of this decree were left with his Honour for his conſideration, and were returned, altered as they now ſtand. J. D.

Fry

24 May 1757.

Fry v. *Proffer.*

Decree *nisi* made abſolute, and proceedings before the Maſter, defendant to be at liberty to rehear upon terms.

THE defendants made default at the hearing, and ſuffered the decree to be made abſolute, and proceeedings to be had before the Maſter.

They apply this day by petition to rehear the cauſe; the caſes cited, were *Cunningham* v. *Cunningham*, 17 *May* 1750 (*a*), *Cay* v. *Cay*, *Hilary*, 1722.

(*a*) Ambl. 89.

Sir *Thomas Clarke* M. R.—Upon paying the coſts of the default, and making the uſual depoſit, and ſubmitting in caſe the decree on the re-hearing ſhould be varied, ſo as to render the proceedings before the Maſter uſeleſs, to pay the coſts, the plaintiffs have incurred; the cauſe to be re-heard.

16 June 1757. Sed Vid. Hicks v. Hicks, infra.

Webb v. *Webb.*

(Reg. Lib. B. fol. 502.)

BY the decree, the eſtates, or a ſufficient part were directed to be ſold, and all *deeds* and writings relating to the eſtates, to be produced before the Maſter; the deeds were accordingly left with the Maſter: part of the eſtates were afterwards ſold, and the incumbrances being diſcharged, the tenant for life of the eſtates, applied the above day to have the deeds and writings delivered to him, which, upon hearing an affidavit of notice read, the Lords Commiſſioners ordered.

Walter

Walter v. *Goring.*

16 and 21 June 1757. Vid. Robinſon v. King, ſupr. 297.

BILL by a ſingle bond creditor againſt the executors and heirs of obligor, to be paid what was due to him, out of the perſonal aſſets of the obligor; and if *not ſufficient, out of the real aſſets* deſcended, and decreed by Sir *Thomas Clarke* M. R.

Scott v. *Fawcet.*

14 July 1757.

Tenants in common of a copyhold. This Court has no juriſdiction to grant them a commiſſion of partition.

BILL to have partition of *copyhold* eſtate, between the plaintiff, and defendant, *tenants in common of the eſtate.*

It ſtood till this day for judgment.

Sir *Thomas Clarke* M. R.—The plaintiff and defendant are tenants in common, of a copyhold; the plaintiff in one third, and the defendant in two other thirds.

The queſtion is, whether the Court can grant a partition of copyhold; the parties indiſputably are not entitled to a partition here, if not entitled at common law, or by act of parliament.

What is there for this Court to ground its juriſdiction upon?

Upon the ſtatute I am clear this juriſdiction is confined to caſes within the ſtatute.

If a legal one, then it is diſcretionary in the Court, whether the Court will exerciſe its juriſdiction.

But this caſe is not; therefore, let the bill be diſmiſſed, but without prejudice to any other remedy, the plaintiff may have.

Boſon

22 July 1757.

Beſon v. *Beſon.*

BILL by the deviſee againſt the heir at law, to eſtabliſh the will of the teſtator, and to execute the truſts, but prays nothing more.

The cauſe was brought to hearing, when Sir *Thomas Clarke* M. R. eſtabliſhed the will, and directed in general, the truſts to be executed, but did not direct any account, and ordered the plaintiff to pay the defendant his coſts.

Trin. 1757. Vid. James v. Dore, ſupr.

Seagood v. *Ferrard.*

AFTER a decree, in which the defendant was an accounting party, and by the proceedings under it before the Maſter, it was evident (though no report had been made), a balance would be due from the defendant to the plaintiff; the plaintiff died; his repreſentative filed a bill, merely to revive; the defendant abſconded to avoid being ſerved with a ſubpœna; the plaintiff purſued the directions of the act of 5th of *Geo.* 2. c. 25. and on hearing the cauſe on the bill of revivor, Sir *Thomas Clarke* M. R. directed the bill to be taken *pro confeſſo.*

William

William Thomas and *Alice* his wife, deviſees under the will of *Dorothy Davis*, the widow of *Morris Davis*, } Plaintiffs.

14 and 15 Nov. 1757.

AND

Benjamin Davis and *Stephen Davis*, deviſees of *Morris Davis*, of whom *Stephen Davis*, was his heir at law, and *John Howel*, heir at law of *Thomas Davis*, mortgagee in fee of the eſtate of the ſaid *Morris Davis* - - - } Defendants.

On a queſtion whether a particular eſtate *nominatim*, not mentioned in a recovery, or the deed leading the uſes of it, paſſed by the recovery, held it did not.

THE bill was to rectify a miſtake in a conveyance, by *Morris Davis* and *Dorothy* his wife, and in a recovery, ſuffered in purſuance of covenants, in the ſaid conveyance; to have a re-conveyance of an eſtate, called *Redmond Hill*, which under general words in the deeds legally paſſed, and to have the benefit thereof, as ſtanding in the place of the ſaid *Dorothy Morris*'s widow, and to ſtay proceedings on the ejectment brought by the defendant *Stephen*, and to be quieted in poſſeſſion.

The queſtion in the cauſe was, whether a *particular eſtate*, by name called *Redmond Hill* in *Conwere*, not mentioned in a deed, leading the uſes of a recovery, nor in the recovery, paſſed under general words "*of all other lands*," and how far the evidence of one *Philips*, the attorney who received the inſtructions to prepare, and did prepare the deed, was admiſſible to prove what was intended.

It was read *de bene eſſe*.

Sir

Thomas et ux. v. *Davis* et al.

Sir *Thomas Clarke*, M. R.—The bill is to be relieved againſt a verdict in ejectment, for recovery of a certain eſtate, called *Redmond Hill* in *Conwere*.

The caſe is this, *Morris Davis* under a ſettlement in 1710, made on his marriage with *Dorothy* his wife, was ſeiſed of lands in three pariſhes, in the county of *Pembroke*; one called *Conwere* in *Conwere*, *Powton* in *Rudbaſton*, and another in *Saint Mary*, *Tenby*.

All theſe are admitted to have been ſettled on the marriage of *Morris Davis* and *Dorothy* his wife, ſo as to have intereſted the wife in the land.

Theſe lands being thus in ſettlement, *Morris Davis* and his wife, in 1710, purchaſed the eſtate in queſtion, called *Redmond Hill* in *Conwere*, and the conveyance is to the huſband and wife, and to the ſurvivor in fee: In 1736, *Morris Davis* being thus ſeiſed, and diſpoſed to mortgage, ſent to *Philips*, to prepare a deed, leading the uſes of a recovery, *Philips* accordingly prepares a deed, inſerts a deſcription of particular lands, *but Redmond Hill is not mentioned*, and then follow general words, *of all other lands*: a recovery is ſuffered following the deed; *Dorothy* the wife joins.

In 1737, a mortgage was executed to *Thomas Davis*, in fee.

The wife ſurvived the huſband.

The queſtions are, whether under the general words *all other lands*, *Redmond Hill* was meant to be, or is included? And whether parol evidence is admiſſible, to prove the intent?

Theſe being the circumſtances of the caſe, I will conſider the force of the evidence, becauſe if it be not ſufficient, there is no occaſion to enter on the queſtion of it's admiſſibility.

The

Thomas et ux. v. *Davis* et al.

The queſtion ariſes on the words of a feoffment: after a deſcription of three particular eſtates, general words of all other his eſtates, in the pariſhes of *Conwere*, *Po:ton*, and *Saint Mary Tenby*, in the county of *Pembroke*.

Do theſe words comprize *Redmond Hill?* I do not think they do include *Redmond Hill:* But other words do; if *Redmond Hill* was not intended, why was the wife to join; and why did ſhe join? That method being deviſed, Mr. *Philips* was ſent for, and inſtructions given to him: it is to be remembered, that the recovery, and deed leading the uſes, in which the wife joined, were for the purpoſe of *effectuating a mortgage*.

What does *Philips* ſay? That he did not know that *Morris* had any other eſtate in *Conwere*, except the eſtate called *Conwere:* that *Morris* did not tell him he had; and that he never heard it till 1737, when *Morris* brought him the purchaſe deed.

Evidence circumſtantial is entitled to read, provided any parol evidence be admiſſible.

The objection is, that it is a direct contradiction to the Statute of Frauds; but I am clear it may be read.

Parol evidence is admitted for ſeveral purpoſes; It is allowed to *rebut* an equity: It is often admitted to prove an original fraud, or *miſtake*, in the latter inſtance where it is joined with other circumſtances; but ſee the caſes on this head, *Pritchard* v. *Quincent* (*a*); the bill was originally to rectify a miſtake; evidence was offered not only to ſhew the miſtake, but to ſhew on the true conſtruction, what was the correlative: In *Hill* v. *Watkins*, the parties ſought to rectify a miſtake in a CourtRoll; minutes of the CourtRoll were produced: In *Young* v. *Young*, the bill was to rectify a miſtake,

(*a*) Ambl. 147. and ſupr. 295.

Thomas et ux. v. *Davis* et al.

and to aſcertain, what the huſband was to ſettle, whether double, or ſingle: the only evidence was parol evidence of the counſel and attorney, accompanied with circumſtances; the Court was of opinion, by that evidence it was authoriſed to rectify: *Rogers* v. *Earl* is no authority, being now *ſub judice*.

This caſe doth not depend on the evidence of *Philips*, but variety of circumſtances. I do not admit this evidence to make an addition to, or in dimunition of the eſtate, only to put a conſtruction on general words; only ſuch conſtruction as ſhall reſtrain, or controul general words.

(a) 2 Atk. 240.

The caſe of *Brereton* v. *Gamul* (*a*), in 1741-2, occurs to me: A tenant of Mr. *Brereton*, by leaſe for twenty-one years, afterwards hold over having lands of his own: In his will, he deviſes all his lands, and levied a fine of all his lands: on this will, evidence was admitted, to prove his intent, as to the lands he held over.

And therefore declare, as between the plaintiffs and the defendant, *Stephen Davis*, the heir at law of *Morris Davis*, the eſtate *Redmond Hill*, upon all the circumſtances of the caſe, is to be conſidered as intended to be compriſed in the deed, leading the uſes of the recovery, dated the 2d of *April* 1736; let the heir at law be reſtrained from proceeding at law to recover it; but I am of opinion the plaintiffs are not intitled to the like, as to the defendant the mortgagee.

Groſvenor

Groſvenor v. *Cook*, et è contra.
(Reg. Lib. A. fol. 32.)

22 and 24 Nov. 1757.

Creditors by bond entitled to intereſt only, to the extent of the penalty: Creditors by note, though not on demand, or on a day certain, or on contract to pay intereſt, to have intereſt, and to be conſidered as creditors by ſpecialty: Creditors by book debts not allowed intereſt.

THE bill by the plaintiffs in the firſt cauſe, was on behalf of themſelves, and other creditors of *Randolph Greenway* the elder, for an account, and ſatisfaction of their debts out of his aſſets.

On hearing the cauſe the 6th of *July* 1735, before Sir *Joſeph Jekyl* M. R. it was refered to Mr. *Kinaſton*, one of the Maſters, to take an account of what was due to the mortgagees, and to the other parties, and to all other the creditors of the ſaid *Randolph Greenway*, the inteſtate; and the Maſter was to adverti ſe for the creditors to come before him, and prove their debts; an account of the teſtator's perſonal eſtate was to be taken, which was to be applied in a courſe of adminiſtration, and by conſent of the mortgagees the real eſtates were to be ſold; and out of the purchaſe money, they were to be firſt paid; and as to what was claimed by the defendant *Charles Scott* on a note of hand, (which he wanted to tack to his mortgage); his Honour declared he ſhould come in as a creditor for the ſame on the perſonal eſtate; and if the ſpecialty creditors ſhould exhauſt any part of the perſonal eſtate, the ſimple contract creditors were to ſtand in their place, and receive a ſatisfaction *pro tanto*, out of the real eſtates; coſts, and further directions were reſerved until after the Maſter's report.

On 16th *July* 1757, the Maſter made his report, and ſtated what was due to the mortgagees, and then goes on to ſtate, that he had taken an account of what was due to the plaintiffs, and the other creditors of the ſaid inteſtate, and found that there was

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due to ſeveral perſons by bond, and otherwiſe, 7381 *l.* and that the ſeveral debts ſet forth in the ſecond ſchedule to his report, conſiſted of debts due upon bond; debts due by *promiſſory notes*, ſome whereof were payable at *times certain*; and others on demand for value *received*, but without any contract for *intereſt*, by way of *damage*; and *others* upon *book* debts, and other ſimple contract debts.

And the Maſter further found, that by the length of time ſince the decree, all or the greateſt part of the principal ſums ſecured by the bonds, exceeded the penalty of the ſaid bonds; and that he had in ſuch caſes, *allowed only the penalty:* And it having been inſiſted on behalf of the creditors by note, that they were entitled to intereſt upon their notes reſpectively; (that is to ſay) upon ſuch as were payable at times certain, from ſuch time as they became reſpectively due, and upon ſuch as were payable on demand from the time of filing the plaintiff's bill, notwithſtanding there was no expreſs contract for intereſt on the ſaid notes; the Maſter therefore, upon conſideration of the premiſes, and for that the effects to pay the creditors by bond, would not be nearly ſufficient to pay the principal monies due to the ſaid creditors; and that if intereſt was to be allowed on the ſaid notes, from the ſeveral times before mentioned, the creditors by note, would be in a much better ſituation, than the creditors by bond, as they would in ſuch caſe, receive above ſix years intereſt more than the creditors by bond, as they would have no more than the penalty of their bonds; and that if ſuch intereſt was allowed, the other creditors by ſimple contract, would have but very little towards payment of their

their reſpective debts, although the ſame had been as long due as the ſaid debts on notes; for which reaſon, and at the requeſt of the clerk in court, and ſolicitor for the plaintiffs, the creditors, the Maſter *ſubmitted* to the Court, whether any *intereſt* ought to be *allowed* on all or any of the promiſſory notes mentioned in the ſecond ſchedule; and if any, from what time, and at what rate: the Maſter then reports, that he had taken the accounts directed of the aſſets of the inteſtate, and the reſpective balances.

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On the 22d of *November* 1757, the cauſes came on to be heard, for further directions, before Sir *Thomas Clarke* M. R. and the great queſtion was, whether *notes* not *payable* on any day certain, and *no contract* to *pay* intereſt, ſhould *carry* intereſt; and alſo, whether the debts liquidated, ſhould carry intereſt. His Honour ſaid, he would conſider the queſtions.

On the 24th of *November* 1757, his Honour delivered his opinion as follows:

Theſe cauſes come before me on a ſpecial caſe, on the Maſter's report, which bears date the 16th of *June* 1757; *Randolph Greenway*, died indebted to divers perſons by bond; by note payable on demand for *value* received; by note payable on a *day* certain, for value received; and by note payable, without either demand, or day certain, for value received.

The Maſter hath reported due to the creditors by bond, to the extent of the penalty of their bonds, and no further, being as he apprehends, confined by the bonds. He alſo reports, what is due for principal, and intereſt, to the creditors by note on demand, or day certain, but does not compute intereſt

Grosvenor v. *Cook*, et è contra.

on the others, and he certifies, that the fund to pay debts, is deficient.

In order to determine, how far theſe ſimple contract creditors are entitled to intereſt, it is neceſſary to ſee how the caſe ſtands at law, and whether there be any equitable circumſtances to alter it.

At law, creditors by bond, are entitled only to the penalty of the bond. The reaſon is obvious; they have choſen their own ſecurity, and it is their fault in ſuffering the debt to increaſe beyond their ſecurity.

As to creditors by note at a certain day, and where by contract, no intereſt is payable; yet courts of law, and a jury will give intereſt.

As this is a legal right, is there any material circumſtance in this caſe, to vary ſuch right? No. I take it to be clear, that the juſtice of this Court is ſuch, that where a creditor comes before it for a legal demand, this Court will give the ſame relief, as he would have been entitled to at law.

In caſe of bankruptcy it is different, becauſe the Court levels all creditors. This is the reaſon given by Lord *Hardwicke* C. in *Mackintoſh* v. *Ogilvie* (*a*), 10th *March* 1747, for granting a writ of *ne exeat regno* to *Stotland*, upon attachment of property there.

(*a*) Supr. 119.

It hath been argued for the bond creditors, that if creditors by note are allowed intereſt, they will be in a better condition, than the creditors by bond: they may be ſo; but as I ſaid before, the bond creditors choſe their ſecurities.

As to the creditors by book debts, though their caſe is hard, and though it may be ſaid, that I could relieve them, yet I muſt not break through rules. Lord *Hardwicke* C. wiſhed to do it in *Bedford* v. *Coke*, 7th *December*

December 1752 (*a*), where there was an ample fund, and there were due 22,000 *l.* for arrears of the Ducheſs of *Wharton*'s annuity, by way of jointure, and ſhe had been obliged to take up money at intereſt for her ſupport, and there were no other ſimple contract debts of longer ſtanding: His Lordſhip directed precedents to be ſearched for, but none could be found; and therefore he did not grant her application, and that of the other ſimple contract creditors for intereſt.

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(*a*) Supr. 178.

His Honour after giving his reaſons as above, made the following order:

"It appearing, that the perſonal and real eſtate of the inteſtate, are not ſufficient to ſatisfy the whole of the debts, declare, the creditors are to rebate in proportion; and the maſter to ſettle the proportions; and the creditors by notes, conſenting, that intereſt upon their notes ſhall be computed only for twenty years after ſuch time, as the money due thereon, became payable, declare, that ſuch creditors in ſettling the ſaid proportions, are entitled to have intereſt computed on their reſpective notes, only for that period of time accordingly, after the rate of 4 *per cent. per annum*, and are to be conſidered as creditors by ſpecialty, for ſuch principal and intereſt; in like manner, as the creditors by bond are to be conſidered as ſpecialty creditors, for the penalties of their reſpective bonds."

24 Nov. 1757.

Owen v. *Owen*.—two cauſes.

(a) Similar reference in the caſe of Conqueſt v. Markham, 5 Jan. 1760. Sir Thomas Clarke M. R.

Two bills, brought by different *prochein amys* in the name of the infant; upon a reference (*a*) to the Maſter, to ſee which ſuit was moſt proper to be proceeded in, the Maſter reported the firſt ſuit: the *prochein amy* in the ſecond ſuit took exceptions, which were over-ruled; upon the petition of the *prochein amy* in the firſt ſuit, the report was confirmed, and the petitioner was to be at liberty to proſecute the firſt ſuit; the Court was preſſed to reſtrain the plaintiff in the ſecond ſuit, from proſecuting that ſuit, but Sir *Thomas Clarke* M. R. refuſed to do ſo, as ſuch proceeding would be at his peril: on ſearching by order of his Honour, precedents could not be found, the parties generally reſting on the report.

6 Feb. 1758.

Mole v. *Mole*.

Maintenance allowed an infant out of the produce of the reſidue of perſonal eſtate, bequeathed to him by his father, where the will directed the intereſt to accumulate, till he attained twenty-one; and if he died before, the whole given over, and the will was ſilent as to maintenance.

Christopher Mole, the father of the plaintiff the infant, by his will, gave to the defendant *Mary Mole* his ſiſter, 500 *l.* and gave the reſidue of his eſtate to the plaintiff, upon his attaining the age of twenty-one years, and the intereſt to accumulate, ſaying nothing as to maintenance; and if he died before, gave it over to the defendant.

The bill was brought by the infant againſt the defendants *Ann Mole* his mother, and *Mary Mole* his aunt, the executrix, for an account of the teſtator's perſonal eſtate, to have the reſidue ſecured, and to have an allowance for maintenance.

The

The cauſe came on to be heard, the 25th of *February* 1750; an account of the perſonal eſtate, and of the debts, and payment were decreed; the defendant *Mary* was to retain her legacy of 500 *l.* and the reſidue of the perſonal eſtate, was to be paid into the Bank, and laid out, ſubject to the contingencies in the will; and the *conſideration of maintenance was reſerved* until after the Maſter's report. *Male* v. *Male.*

The Maſter made his report, and aſcertained the reſidue of the perſonal eſtate, which was conſiderable.

The cauſe came on the 31ſt of *January* 1758, for further directions, as to maintenance, and ſtood till this day (*a*) for judgment.

Sir *Thomas Clarke* M. R.—This cauſe comes before the Court, as to maintenance, and coſts reſerved by the decree, (*a*) 6 Feb. 1758.

The queſtion is, whether the plaintiff the infant, is entitled to maintenance out of the produce of the reſidue of the perſonal eſtate: I am ſorry it is made a queſtion.

It is to be conſidered, whether maintenance can be allowed out of the produce of a reſidue that depends upon contingency, and while it is in ſuſpence.

There is a difference between a legacy given by a parent, and a diſtant relation. *Shudal* v. *Jekyll*, 2 *Atk.* 516.

Firſt.—Suppoſe a legacy is given by a parent, payable at twenty-one; the Court will give intereſt from the death of the parent, in caſe the child ſhould want maintenance.

Secondly.—Suppoſe a legacy given to a child, veſted immediately, but defeaſible on the contingency of dying before twenty-one; there is no doubt but the

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Court would give intereſt, from the death of the teſtator; but in this caſe it is ſaid, there is more reaſon for doing ſo, becauſe it is veſted *in præſenti*.

There are inſtances where maintenance is allowed out of a real eſtate; that is, where a portion is charged on a real eſtate, but not to be raiſed until the child attains twenty-one.

With reſpect to authorities: *Houghton* v. *Harriſon*, 30th *June* 1742 (*a*), on a legacy to an infant, by his grandfather, to go over if he died *before twenty-one*, it was contended intereſt ſhould be allowed,

(*a*) 2 Atk. 329.

Chaffey v. *Weaver*, 21ſt *May* 1750.

Heath v. *Perry*, 9th *June* 1744 (*b*). Legacy by a ſtranger to an infant, and over, if he die before twenty-one: intereſt contended for, but denied, becauſe too remote; yet it was laid down to be *otherwiſe*, in the caſe of a legacy left by a parent, *Incledon* v. *Northcote*, 2d *March* 1746-7 (*c*), on a legacy by a parent to ſuch child, as ſhould attain twenty-one; intereſt was allowed.

(*b*) 3 Atk. 101.

(*c*) 3 Atk. 430.

Greenhill v. *Waldoe*, *Precedents in Chancery* 367, portion by ſettlement for a daughter, payable at eighteen, or day of marriage, after the death of the father, and mother: the father, and mother both died, before either of thoſe contingencies, yet maintenance was allowed.

And I think the plaintiff in the preſent caſe, is entitled to maintenance; and therefore let the Maſter conſider of a proper allowance, for the maintenance, and education of the plaintiff the infant, from the death of her father the teſtator, to be paid out of the produce of the teſtator's eſtate.

And

And it appearing from the report, that the reſidue of the teſtator's eſtate, conſiſted of 6,800 *l.* bank annuities, the executrix was directed to transfer the annuities to the Accountant General, ſubject to the truſts, and contingencies in the will. *Mole* v. *Mole.*

Turner v. *Turner.*

20 April 1758.

THE cauſe came on to be heard, for further directions on the report, *which was confirmed.*

Sir *Thomas Clarke* M. R. not being ſatisfied, referred it back to the Maſter, to review his report, and to be more particular.

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29 April 1758.

Robert Johnſon, the heir at law, Plaintiff.
Edward Gardiner, and his wife the deviſee, - - - } Defendants.
The ſaid *Edward Gardiner* and his wife, - - - } Plaintiffs.
And the ſaid *Robert Johnſon*, - Defendant.

(Reg. Lib. A. fol. 261.)

THE bill in the firſt cauſe, was to have a receiver appointed, of part of the teſtator's eſtate, of which the plaintiff had got poſſeſſion; to have the will ſet aſide, as being obtained by fraud; to have poſſeſſion of the reſt of the real eſtates, and the title deeds; and to have a diſtributive ſhare of the teſtator's perſonal eſtate.

Heir at law files a bill to ſet aſide a will which upon an iſſue is eſtabliſhed; ordered to pay coſts in this Court, and at law; but on a bill by the deviſee, to eſtabliſh the will, no coſts given on either ſide.

The bill in the ſecond cauſe by the deviſees, was to have an iſſue directed, to try the validity of the will.

On

Johnſon v. *Gardiner* et ux.

On hearing theſe cauſes, the bill in the firſt cauſe was diſmiſſed with coſts, ſo far as it prayed a diſtributive ſhare of the perſonal eſtate, and an iſſue *deviſavit, vel non* was directed, and the reſt of the coſts and further directions reſerved.

There was a verdict in favour of the will.

(*a*) 29 April 1758.

Theſe cauſes came on again this day (*a*), on the equity reſerved, and for coſts; the queſtion was as to the heir at law paying, or having coſts; Lord Keeper *Henley* reaſoned in the ſame manner, as Lord *Hardwicke* C. did in *Blinkorne* v. *Feaſt* (*b*), that coſts were diſcretionary; that there was a diſtinction between an heir at law coming to the court for relief, and being brought into Court; and therefore diſmiſſed the bill in the firſt cauſe, in which the heir at law was plaintiff, with coſts; and in the ſecond cauſe by the deviſee, eſtabliſhed the will, but gave no coſts, either in this Court, or at law, on either ſide.

(*b*) 2 Veſ. 27. 1 P. Wms. 285. S. C.

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1 May 1758.

Kettle v. *Corbin.*

BILL that the defendant might redeem, or ſtand forecloſed: the defendant not appearing, the plaintiff was to take ſuch decree as he could hold, *unleſs cauſe*: the plaintiff at the ſame time, prayed an injunction to ſtay waſte, but Sir *Thomas Clarke* M. R. refuſed it, ſaying, an injunction is granted only on an interlocutory application.

Langley

Langley v. *Furlong*. 3 July 1758.

A ſettlement under articles, deviating from them, ſet right, and made to agree with the articles, and what the eſtate was damnified, by the tenant for life not upholding it as he ought, declared to be a ſpecialty debt, and to be anſwered out of his aſſets.

BILL by a tenant in tail, under marriage articles, dated the 15th *January* 1689, to have the ſettlement dated the 9th of *April* 1691; ſo far as it deviates from thoſe articles rectified; and to have what the eſtate was damnified, by the tenant for life not upholding it as he ought, anſwered by his repreſentative out of his aſſets.

" Sir *Thomas Clarke* M. R. declared the ſettlement of the 9th day of *April* 1691, ſo far as it varied from the ſaid articles, ought to be rectified, and made agreeable thereto; and that the plaintiff *Jane Langley*, the daughter of *Elizabeth Langley*, who was the ſiſter of *Charles* the ſon of *Charles Burwell*, the only ſon of the marriage between *Henry Burwell* and *Elizabeth Mathew*, was tenant in tail of the *Maxway* eſtate, purchaſed with the ſum of 2000 *l.*, ſtipulated to be laid out by the ſaid articles, with remainder to the daughters of that marriage as tenants in common in tail general; with remainder to the plaintiff *Jane*, as right heir of the ſaid *Henry Burwell*. And let the ſaid eſtate be ſettled accordingly, with the approbation of the Maſter; and let the Maſter enquire in what condition the ſaid eſtate was left by the ſaid *Henry Burwell* at the time of his death; and whether he did ſufficiently uphold, and maintain the ſaid eſtate as a tenant for life ought: and in caſe he did not, let the Maſter ſee how much the plaintiff is damnified for want of the ſaid eſtate's being ſo upheld, and maintained; and let the plaintiff be conſidered as a creditor by *ſpecialty* for what the Maſter ſhall find ſhe was ſo damnified,

Langley v. *Furlong.*

nified. And then follows a direction for the executors to pay the plaintiff out of the perſonal eſtate in a courſe of adminiſtration; and if aſſets not admitted, to account: and the defendants to account for the rents, and profits of the ſaid eſtate accrued ſince the death of the ſaid *Henry Burwell*, and to pay the ſame to the plaintiff; and alſo to deliver poſſeſſion of the ſaid eſtate to the plaintiff.

12 Nov. 1758.

Turner v. *Turner.*

Bill decreed to be taken *pro confeſſo* upon a ſequeſtration, for want of a better anſwer, the firſt having on exceptions to part of it been reported inſufficient.

THE defendant had anſwered; which, as to ſo much as exceptions taken to it went, was reported inſufficient; and the defendant having ſtood out all proceſs of contempt to a ſequeſtration for want of a better anſwer, the plaintiff's clerk in Court was ordered to attend with the record of the plaintiff's bill, in order to take it *pro confeſſo*. The cauſe came on to be heard on the above day, when the Counſel objected to the propriety of it; for that it could not be ſaid to confeſs the bill, when there was an anſwer upon record (part of which was not excepted to) that denied it; and cited *Hawkins* v. *Crook*, 2 *P. W.* 556 (*a*); and ſaid further, that there was a caſe under the conſideration of the Barons of the Exchequer upon a like queſtion.

(*a*) Moſel. 294. 383. 3 Atk. 594. S. C.

Lord *Hardwicke* C. ſaid he well knew the caſe of *Hawkins* v. *Crook*, and had always thought it wrong, for that in his idea an inſufficient anſwer was no anſwer: that the defendant, after ſuch contumacy, and affected delays, had not any reaſon to expect favour from the Court, much leſs, that they would ſtrain a point

point for him; and therefore he ſhould decree the bill to be taken *pro confeſſo*, (which he did), and would leave it to the defendant to apply to ſet it aſide for irregularity, if he thought fit.

Turner v. *Turner.*

Eaſtland v. *Reynolds.*

13 & 14 Nov. 1758.

On queſtions, whether a child by marriage broke the condition annexed to her legacy, and whether there were croſs-remainders as to real eſtate, determined in the negative on both.

THE bill is brought by *Richard Eaſtland*, the ſurviving executor of Sir *Robert Wilmot*, that the claims of the defendants may be aſcertained, and to have the directions of the Court for the execution of the truſts of the teſtator's will.

Sir *Robert Wilmot*'s will is dated the 25th of *October* 1746; and by his will he appointed *John Wilſon* deceaſed, and the plaintiff, executors.

The teſtator by his will gives 3000 *l.* a-piece to his three daughters, *Elizabeth*, *Ann*, and *Unice*, payable at marriage; provided they married with the conſent of his wife, and his executors, to be had in writing.

The intereſt of ſuch 3000 *l.* to be paid as long as each of the daughters lived with their mother; and if they refuſed to live with their mother, only 50 *l.* a year, and the intereſt to accumulate, and to go and be paid as their original portions: but if any of the daughters died before marriage, 1500 *l.*, part of the 3000 *l.*, to be divided amongſt the ſurviving daughters: if two died, then the ſurvivor to have 5000 *l.*, and the intereſt of the 1500 *l.*, part of one 3000 *l.*, or 4000 *l.* the remainder of the 9000 *l.* as it ſhould happen, according to the contingencies expreſſed in the will, to be paid to their mother for life, and then to the ſurviving daughters, or daughter, upon the ſame

Eaſtland v. Reynolds.

terms as the original portions of 3000 *l.* are given: and in caſe all the daughters died in the life-time of their mother, then the intereſt of the whole 9000 *l.* to the wife for life; and after her death, the capital to *Elizabeth Spurrier*, (the wife of the defendant *Joſeph Spurrier*), her executors, or adminiſtrators.

And if his perſonal eſtate amounted to more than 9000 *l.*, the intereſt of the overplus to be paid to his wife for life; and after her death, the capital of ſuch ſurplus to be paid to ſuch of his children as ſhould be living at her death, and to be paid when their original 3000 *l.* bequeſts became payable in manner aforeſaid.

And in caſe all his ſaid three daughters died without iſſue, he deviſed his real eſtates to the ſaid *Elizabeth Spurrier* in fee.

The teſtator died the 9th *October* 1746, and left Lady *Wilmot* his widow, and three daughters, *Elizabeth*, *Ann*, and *Unice*.

Part of the teſtator's real eſtates were copyhold, which, not having been ſurrendered to the uſe of his will, his ſaid daughters, being heirs, were admitted.

Elizabeth died in the life-time of her mother, without iſſue, and unmarried.

Ann married with the defendant *Thomas Reynolds*, with the *conſent* of *her mother*, but not of the executors, who refuſed it.

In 1750 Lady *Wilmot* died: *Reynolds* and his wife, and *Unice*, entered on the real eſtates, and received the rents.

After the death of Lady *Wilmot*, and *John Wilſon*, one of the executors, *Unice* married *Thomas Anderſon*, without

without the conſent of the plaintiff, and died in 1754 without iſſue.

Thomas Anderſon took out adminiſtration to his wife, which afterwards was revoked, and adminiſtration was granted to *Reynolds*, and his wife.

Reynolds and his wife inſiſt, that having the conſent of the mother, and the executors having unduly refuſed to give their conſent, they have not forfeited their right to the portions; and Lady *Wilmot* the mother being dead, and the other two ſiſters being alſo dead without iſſue, they are entitled to the whole of the perſonal eſtate, and likewiſe to the real eſtate of the teſtator; for that the words of the will implied, and muſt be conſtrued to create, croſs remainders.

Mr. *Perrot* and Mr. *De Grey*, on the part of the defendants *Spurrier* and his wife, inſiſted, that as to the real eſtate there were no croſs remainders, and cited the following caſes; *Garbel* v. *Vandal*, 26th *November* 1739, determined by Mr. *Verney* M. R.; *Reyniſh* v. *Martin*, by Lord *Hardwicke* C., 5th *May* 1746 (*a*); *Wheeler* v. *Bingham*, by Lord *Hardwicke* C., 13th *June* 1746 (*b*).

(*a*) 3 Atk. 330. 1 P. Wms. 130. S. C.

(*b*) 3 Atk. 364. 1 P. Wms. 135. S. C.

Sir *Thomas Clarke* M. R.—There are two queſtions in this cauſe: one relative to the perſonal eſtate; the other to the real eſtate.

The firſt queſtion is, whether the defendant Mrs. *Reynolds* is entitled to the legacy, or portion given by the will of her father, as having been guilty of a breach of the condition annexed to the legacy. Sir *Robert Wilmot* had three daughters, *Elizabeth*, *Ann*, and *Unice*; and by will gives his perſonal eſtate to truſtees to be placed out at intereſt, and to pay to each of his daughters 3000 *l.* on marriage, and not before;

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before; and then only in caſe they married by the conſent of his wife, and his executors in writing.

His Honour then ſtated the clauſes in the will before ſet forth in caſe of their marrying without conſent, and of their, or any of their, dying without iſſue.

Elizabeth died after the teſtator, unmarried: *Ann* married the defendant *Reynolds* with the conſent of the mother, but not of the executors: *Unice* married after the death of her mother, and of *Wilſon*, one of the executors, ſo that the conſent required by the will could not be had.

Reynolds and his wife have taken out adminiſtration to her.

Let us ſuppoſe a pecuniary legacy given by a parent to a child, with a condition annexed: and this is certainly a pecuniary legacy out of a perſonal eſtate.

The rules of the Eccleſiaſtical Courts are clear, that conditions in reſtriction of marriage are void, as only *in terrorem*, and are all void, where there be a limitation over, or not, except *in pios uſus*.

We differ from them in reſpect to limitations over, becauſe it is plain the teſtator meant a benefit for a third perſon.

Here there is a perſonal legacy which hath a condition annexed to it, and we muſt admit by the words a condition precedent; but if there be a limitation over, it makes no difference, whether the condition be precedent, or ſubſequent. I am in the preſent caſe, and under the particular circumſtances, of opinion Mrs. *Reynolds* hath not forfeited her legacy: The mother did conſent; the executors improperly withheld theirs.

As

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As to the real eſtate, I am clear there are no croſs-remainders. His Honour then cited the following caſes: *Daily* v. Lord *Clanrickard*, by Lord *Hardwicke*, 11th *December* 1738; *Davenport* v. *Oldis*, 12th *July* 1738 (*a*). His Honour therefore declared, under all the circumſtances of the caſe, the defendant *Reynolds*, in right of his wife, was entitled to the whole 9000 *l.* provided for the three daughters, and directed payment, ſubject to an enquiry as to a ſettlement.

(*a*) 1 Atk. 579.

And alſo declared, that according to the true ſenſe, and conſtruction of the will, and circumſtances of the caſe, there were to be no croſs-remainders, and conſequently that on the death of *Elizabeth* without iſſue, one third of the eſtate belonged to the defendant *Spurrier*.

Lee v. *Lee.*

10 Dec. 1758.

If the wife elope, this Court will not aſſiſt her in recovering property ſettled to her ſeparate uſe.

ON the marriage of the plaintiff with defendant, her eſtate was ſettled to her ſeparate uſe. The huſband received the rents, and refuſing to pay her what he received, ſhe having abſented herſelf from him, ſhe filed a bill againſt him, and for an injunction to reſtrain him from receiving any more of the rents. She applied this day to reſtrain her huſband from receiving the rents, and for a receiver, and that he might pay the rents to her.

But Lord *Northington* C. would not aſſiſt her, and made no order. The caſe of *Moore* v. *Moore* (*b*), was cited, in which a woman left her huſband without juſt cauſe, and it was held that this Court would not give her any aſſiſtance to get alimony.

(*b*) 1 Atk. 272.

Lord Keeper Henley. 1 Feb. 1759.

Ramſden v. *Hilton.*

THE ſolicitor's bill was taxed, agreeably to the ſtatute of 2 *Geo.* II. chap. 23. It amounted to 1038 *l.*, and was taxed 1000 *l.*, not a twenty-eighth part. On application by the ſolicitor to be paid the coſts of the taxation, the Court refuſed it.

15 Feb. 1759. Ambl. 370. S. C.

Tullet v. *Tullet.*

Timber improperly cut down during infancy, and infant dying, ſhall go as real eſtate.

THE bill was brought to have an account of timber cut down during the infancy of *John Tullet*, of whom the plaintiff was heir; and to have the ſame conſidered as real eſtate; inſiſting, that though timber was ſevered, yet, as it was unwarrantably ſevered, it did not alter the property.

The cauſe ſtood for judgment to this day.

Sir *Thomas Clarke* M. R.—The plaintiff in this caſe is heir of *John Tullet*, who was ſeiſed in fee of a freehold eſtate, on which there was growing a conſiderable quantity of timber. *John* dying in his infancy, the eſtate deſcended to the plaintiff.

The mother of the ſaid infant cut down timber during the infancy.

The infant died before he was of age to make a will.

The plaintiff, as heir of the infant, hath brought his bill to have the timber ſo cut down conſidered as the real eſtate of the infant.

This is clear, notwithſtanding what is mentioned in Lord *Coke*, that a guardian of an infant, duly appointed,

pointed, is entitled to do every thing as an adult would have done, that if a guardian do any act to alter the course of succession, without leave of the Court, this Court will set it right.

The only thing that induced me to consider of the case, was the case of *Saville* v. *Saville*(*a*) that was cited. If it were in the power of the guardian to cut down timber unnecessarily, that is, not for repairs, &c. and and such cutting would alter the property, the consequences are apparent.

(*a*) 2 Atk. 458.

A mother, for instance, guardian of an infant a year old, and his death almost certain, with 10,000 *l.* worth of timber on an estate, cuts it down. If by severing it, it becomes personal estate, she, under the statute, will come in for a distributive share.

See how it is almost daily in this Court as to personalty. If an estate descends to an infant in mortgage, and out of savings application is made to pay off the mortgage; the Court adds, but *so as not to alter* the nature of the property, whereby his personal representative might be affected.

The Court will certainly, and ought to use the same caution with respect to realty, and not suffer any person's interest to be impaired by the unwarrantable act of another.

Therefore declare the timber cut down is to be considered as real estate, and belongs to the heir at law; and let an account be taken, and the money be paid into the Bank, and laid out in bank annuities: and if the plaintiff dies before twenty-one, it will go in succession as real estate to the plaintiff's heir at law.

1 March 1759.

Gibbons v. *Hills*.

Bank annuities directed by will to be purchaſed out of perſonal eſtate, to be conſidered as pecuniary legacies.

THE teſtator, by his will, directed 3920*l.* bank annuities to be purchaſed out of his perſonal eſtate, for perſons named in his will, and gave ſeveral legacies to other perſons. The perſonal eſtate not being ſufficient to purchaſe ſo much bank annuities, and to pay the other legacies, a queſtion aroſe, whether the bank annuities ſo directed to be purchaſed were to be conſidered as pecuniary, or ſpecific legacies. Sir *Thomas Clarke* M. R., after hearing Counſel on both ſides, held the bank annuities ſo to be purchaſed were to be conſidered as pecuniary, and not as ſpecific legacies.

13 March 1759.

Williams v. *Floyer*.

APPLICATION being made for the records of the bill and anſwer, and the ſame not being produced, being either ſtolen, or loſt, Mr. *Currer*, the late clerk in Court, and Mr. *Trollop* his ſucceſſor, were ordered to attend Sir *Thomas Clarke* M. R. on the above day. The petition was brought on this day; when it appearing the records were not to be found, they having been ſtolen by agents in the office, new engroſſments from the office copies were ordered, and to be depoſited in the office.

A ſimilar caſe was cited.

Trigg

Trigg v. *Trigg*. 3 April 1759.

ON hearing the cauſe, a commiſſion of partition was directed to divide the eſtate in moieties between the plaintiff, and defendant, with directions for the parties to produce deeds, &c. before the commiſſioners.

The defendant being in contempt for not producing the deeds, &c. he was taken on an attachment, being ſerved with a writ of execution of the decree, and turned over to the Fleet.

A ſequeſtration was ordered to iſſue againſt him.

Elliot v. *Williams*. 2 May 1759.

A COMMISSION having iſſued for the examination of witneſſes at *Haverfordweſt*, divers exhibits, which had been examined to thereon were, by the country ſolicitor, put into a box and directed for the town ſolicitor, and delivered to the *Monmouth* carrier, with ſtrict charge of care; the perſon who conveyed them to the carrier alledging they *might* be worth 20,000 *l.*

The carrier, or his book-keeper, thereupon marked the box 20,000 *l.* value, and on its arrival in town 100 *l.* was demanded for carriage of the town ſolicitor, who offered one guinea, though the carriage by weight did not amount to more than five, or ſix ſhillings.

Elliot v. *Williams.*

Lord Keeper *Henley* directed the box to be opened in the preſence of the town ſolicitor, the book-keeper here, and another perſon on behalf of the country carrier, and if it contained nothing but writings, or common goods, it was to be delivered on payment of one guinea; but if any jewels, plate, or money, the ſame were to be retained till further conſideration, but the writings in the mean time were to be delivered.

This deciſion was on the ground that the keeping of the exhibits tended to a delay of juſtice in the cauſe.

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8 May 1759. Ambl 36[illegible]. S.C.

Negus v. *Coulter.*

Leaſehold eſtate given by will to a charity, and the reſidue of the perſonal eſtate alſo to the charity, the bequeſt of the leaſehold void, but the produce of the leaſehold to be applied, firſt in payment of debts, &c.; and if deficient, then to have recourſe to the other part of the perſonal eſtate.

THIS cauſe aroſe in relation to a queſtion on bequeſt of a leaſehold eſtate given to a charity, and the reſidue of perſonal eſtate alſo given to charity.

The cauſe ſtood for judgment this day.

Sir *Thomas Clarke* M. R.—If the bequeſt is void by the Statute of Mortmain, the queſtion is, whether that bequeſt will go as an undiſpoſed part of the perſonal eſtate, or accrue to the reſiduary part, which is alſo given to the charity.

If a bequeſt becomes accidentally ineffectual, it will moſt clearly fall into the reſidue, In the caſe of *Mogg* v. *Hodges* it is clearly laid down to that effect. When a reſidue is given, it takes in not only what is given *after* payment of debts, &c. but what may accrue by accident, or contingency. There is difference between real, and perſonal eſtate, becauſe the reſidue of real eſtate

eſtate is certain, and preciſe, but perſonal eſtate is fluctuating. *Negus* v. *Coulter.*

In *Tomkin* v. *Tomkin*, 4 *March* 1754, the teſtator gave all his eſtate to a particular charity: he had no freehold, but leaſehold, and other perſonal eſtate. The gift of the leaſehold as to the charity was declared void, but then the Court threw all the debts and legacies on the leaſehold, and left the other part of the perſonal eſtate to anſwer the intent of the charity.

So in the preſent caſe, his Honour declared ſuch part of the teſtator's leaſehold eſtate as was given to the charity void, but directed the debts, legacies, &c. to be paid out of ſuch leaſehold eſtate in the firſt place; and in caſe it were deficient, then to have recourſe to the other part of the perſonal eſtate; and in caſe there ſhould be any ſurplus ariſing from the leaſehold eſtate, that to go to the next of kin; and the reſidue of the other part of the perſonal eſtate to go to the charity, for which it was given.

Knight v. *Pechey.*

17 May 1759.

Queſtion as to the admiſſibility of evidence to ſupport the plaintiff's equity.

BILL to be let into poſſeſſion of ſome burgage tenements at *Midhurſt*, and to have a conveyance of them, inſiſting that the title under which the defendant held was borrowed; and in order to prove his caſe, the plaintiff offered to read ſome books.

To this evidence objection was taken on the ground of it's being contrary to the Statute of Frauds.

Sir *Thomas Clarke* M. R.—The queſtion now is, on the admiſſibility of evidence offered by the plaintiff to a material part of the caſe.

Knight v. Pechey.

It is neceſſary to ſee what his caſe is, and how far the evidence is contradictory to the Statute of Frauds.

The bill is, to have a conveyance of ſome burgage tenements, as repreſentative of Mrs. *Knight*, who was repreſentative of Mr. *Lewkner*.

The defendant Sir *William Pechey* claims the tenements under the will of Sir *Bulſtrode Pechey* Knight, the ſecond huſband of the ſaid Mrs. *Knight*.

The plaintiff inſiſts the burgage tenements were the property of Mrs. *Knight*, as repreſentative of Mr. *Lewkner*.

The defendant inſiſts they were the property of Sir *Bulſtrode Pechey* Knight, and by him deviſed to Sir *John Pechey*, who deviſed them to him the defendant.

The plaintiff, in order to make out his title, produces theſe books, and ſays, *Bulſtrode Pechey* had no title until he married Mrs. *Knight*: that in 1722, ſtanding candidate to repreſent *Midhurſt* in parliament, in order to effectuate his intereſt, he wanted the deeds, and gave ſecurity to return them; that a ſchedule was taken of them; and that they were lent, and returned accordingly.

In order to ſhew the tenements belonged to Mr. *Lewkner*, books are produced to ſhew payment by his ſteward.

The intent of the Statute of Frauds is to to take in truſts in part declared, and not fully.

In the caſe of a purchaſe by *A.*, and a receipt in his name, yet evidence hath been admitted to prove the purchaſe to be in truſt for *B.*

The

Knight v. *Pechey.*

The Court hath made a diſtinction between the caſe, where on evidence admitted the plaintiff files a bill to ſupport his equity, and the caſe where the evidence offered by a defendant is to rebut an equity.

The books produced are to ſhew the receipt of 800 *l.* as a ſecurity to return the deeds lent to *Bulſtrode Pechey*, and the re-payment of that money.

And the next intent of producing the books is, to prove the payment of the conſideration money for ſome part of the tenements.

The production is to ſupport the plaintiff's equity, for which his bill is filed. I think, therefore, the evidence admiſſible, and let it be read.

Weſtly v. *Clarke.*

27 June 1759.

Three executors join in a receipt for conformity, thinking it neceſſary, for money, part of the aſſets, paid to one of them, which he diſſipated; held that the others were not liable.

MATTHEW *Smith*, by his will, dated 1755, amongſt others gave the plaintiff a legacy, and appointed the defendants *Betts*, and *Clarke*, with one *Cæſar Thompſon*, who was an attorney, and concerned for him in his affairs, executors of his will, with this clauſe, that each ſhould be anſwerable for his own acts, and not the one for the other. Part of the perſonal eſtate was a mortgage for a term of years, which *Thompſon* called in, and received the money ſecured thereby to the amount of 600 *l.*, and having executed a re-conveyance, with a receipt indorſed, which he alſo ſigned, he ſent the ſame to his co-executors to execute, and ſign, which they did for the ſake of conformity, and thinking it neceſſary.

Thompſon

Wehly v. *Clarke.*

Thompſon having applied the money to his own uſe, and afterwards becoming a bankrupt, the teſtator's aſſets by means thereof became deficient to ſatisfy the plaintiff's legacy, and therefore the plaintiff filed his bill againſt the defendants for an account of the teſtator's perſonal eſtate, and to be paid his legacy; with a view, as the defendants *Betts* and *Clarke* had executed the re-conveyance, and ſigned the receipt for the mortgage money, to have it conſidered as a receipt *in ſolido*, and to make them anſwerable at leaſt for their proportions of it.

The following caſes were cited: *Townley* v. *Challoner*, *Bridgman* 38; the ſame caſe, *Cro. Car.* 312; *Fellows* v. *Mitchell* and *Owen*, 2 *Vern.* 504. 515, the ſame caſe, 1 *P. Wms.* 81; *Murrel* v. *Pitt*, 2 *Vern.* 570; *Churchill* v. *Hobſon*, 1 *P. Wms.* 241; *Brown* v. *Litton*, *Wms.* 140; *Pooley* v. *Wray*, 1 *P. Wms.* 355.

Lord *Northington* C. ſaid, that had the defendants been truſtees, the caſe might have been different: that the receipt of one executor was a good diſcharge; that what *Clarke*, and *Betts* had done was an act of ſupererogation: it was unneceſſary, and had been done merely for the ſake of conformity; that it was not even ſtated by the bill that they had received any part of the money; on the contrary, that *Thompſon* had received the whole; and the will providing that each of the executors ſhould be anſwerable for his receipt only, he was clear that *Clarke* and *Betts* were not anſwerable; and accordingly his Lordſhip declared, that the defendants *Clarke*, and *Betts* were not liable to make good the 600 *l.* received by *Thompſon*.

Gaynon

Gaynon and *Ann* his wife, late *Ann Foley*, v. *Wood*. 19 July 1759.

A debt held to be satisfied by a legacy.

BILL, filed for an account of the eſtate of the teſtator, and to be paid two legacies of 500 *l.* each, given by the will, and codicil.

Sir *Thomas Clarke* M. R.—The teſtator, by *his will*, gives to the plaintiff *Ann Foley*, now the wife of the plaintiff *Gaynon*, 500 *l.*, then 500 *l.* to charity, and appoints *Griffiths*, and *Wood* his executors.

After making his will, the teſtator contracted debts with the plaintiff *Ann*, and gave her his bond for ſecuring 200 *l.*

By a *codicil* he revokes the charity legacy of 500 *l.*, and gives the ſaid legacy to the ſaid plaintiff *Ann*, over, and above the 500 *l.* given to her by the will; and alſo gives to her all his ready money, and bank bills, and *doth not diſpoſe* of the reſidue. The defendant *Griffiths* renounced: *Wood* alone proved the will, and poſſeſſed the perſonal eſtate, and *paid the bond debt to the plaintiff Ann*.

The bill is, to be paid the *two legacies*. The defendants inſiſt that the legacy given by the codicil is a ſatisfaction of the debt of 200 *l.* due by bond to the plaintiff *Ann*.

The queſtion is, whether the rule of ſatisfaction takes place, ot whether there is any conſideration to take it out of the general rule.

The general rule, though admitted to have long prevailed, yet has not eſcaped cenſure.

When all creditors, and legatees were by the will directed to be paid, if the perſonal eſtate were not ſufficient, they were to be paid *pari paſſu* till the time of

Gaynon et ux. v. *Wood.*

of Lord *Nottingham* C., when he declared, that a teſtator muſt be ſuppoſed to be juſt, before he is bountiful, and therefore directed the creditors to be paid; and if the perſonal eſtate were not ſufficient, the legatees to abate.

The bequeſt of the 500 *l.* by the codicil muſt be taken as an original bequeſt: there is nothing ariſes upon the will, or codicil to alter the common caſe.

There is nothing that ariſes upon the caſes that have been cited to alter it.

Chancey's caſe, 1 *P. W.* 408, was the firſt caſe. In that caſe the teſtator directs *all his debts, and legacies to be paid*; and the Court held, that a teſtator, when he ſays, I *give* to *A.* 500 *l.*, could not be ſaid to give 500 *l.* if 100 *l.* were to go in ſatisfaction of debts of which the law would enforce payment; beſides, he directs his debts to be paid.

In *Lothian* v. *Lothian*, 17th *November* 1740, a bill was entertained by a ſiſter againſt her brother, as executor of her father, to be paid the ſum of 180 *l.*, due to her out of the teſtator's eſtate. It was inſiſted by the defendant, that the debt was ſatisfied by a legacy of 500 *l.* given by the teſtator.

The Court would not enter into the queſtion, becauſe it was not preciſely put in iſſue.

Cuthbert v. *Peacock*, 1 *Salk.* 155, and 2 *Vern.* 593, *Cranmer*'s caſe was reverſed by Lord *Harcourt* C. (*a*).

(*a*) Salk. 508. 2 Eq. Ca. Abr. 350. S. C.

I therefore ſee nothing in this caſe that takes it out of the general rule; and as to the defendant's having paid the debt, it makes no difference. When a perſon comes into this Court for equity, he muſt do equity; and the defendant muſt have an allowance out of the plaintiff's legacy of what he paid for the debt.

Therefore declare the legacy of 500 *l.* given to the plaintiff *Ann*, by the codicil is to be conſidered, and deemed a ſatisfaction of the bond for 200 *l.* given by the teſtator to the plaintiff. *Gaynon* et ux. v. *Wood.*

And let an account be taken of the debts and legacies, particularly of the ſaid two legacies of 500 *l.* and 500 *l.*

And let the defendant *Wood* the executor, have an allowance out of the legacy given by the codicil, of what he paid for principal and intereſt, in reſpect of the ſaid bond for 200 *l.*

Ballard v. *Hobbs.*

Lord Keeper Northington. 7th Nov. 1759.

Demurrer in the petty bag, made a *concilium*, and ordered to be argued, and afterwards overruled.

THE order of this day ſtates, that the plaintiff had brought an action in the petty bag againſt the defendant, and declared for the ſum of 50 *l.* due to him; to which declaration the defendant had demurred, and the plaintiff had joined therein; and upon reading the record, it was ordered, that the ſame be made a *concilium*; and that the demurrer ſhould ſtand in the paper of cauſes, to be argued on the 13th of the ſame month, of which notice was to be forthwith given.

The demurrer was brought on (*a*), but the defendant not appearing, and ſervice of the above order being proved, it was ordered, that the demurrer ſhould be over-ruled, and that the plaintiff ſhould have judgment againſt the defendant.

(*a*) 13 Nov. 1759.

Wardel

Mich. 1759.

Wardel v. *Dent.*

Commiſſioners' ſummons for witneſſes to attend and be examined not ſufficient; they muſt be ſerved with a ſubpœna.

CONSTANTINE Phipps and others, being ſerved with the Commiſſioners' ſummons, to attend and be examined, neglected to attend, whereupon the defendant obtained an order, *niſi*, that they ſhould at their own expence, attend, and put in their examination, in the Examiner's office; on their ſhewing for cauſe, that they had not been ſerved with a ſubpœna *ad teſtificandum*, and only with the Commiſſioners' ſummons; Lord *Hardwicke* C. allowed the cauſe, and diſcharged the order.

Demurrer of witneſs over-ruled, and he ordered to pay 5 *l.* coſts.

Phipps having afterwards demurred to five of the interrogatories, the demurrer was argued, 17th *December* 1759, and over-ruled; and *Phipps* ordered to pay 5 *l.* coſts of over-ruling demurrer.

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20 Nov. 1759.

Ex parte *Carpenter.*

(Reg. Lib. A. fol. 21.)

Commitment for breach of franchiſe.

THIS was an application by petition, to commit *James Graham*, for breach of franchiſe; he was a ſheriff's officer, and had arreſted *Carpenter* in the liberty of the Rolls, the writ not being backed by the Maſter of the Rolls.

Sir *Thomas Clarke* M. R.—This application complains of breach of franchiſe.

Two queſtions ariſe upon this petition; Firſt what the franchiſe is; Secondly, whether the party has been guilty of a breach of it.

This

Ex parte *Carpenter.*

This diſtrict is an ancient part of the juriſdiction of the Rolls, and is extra-parochial, and no writ can be executed, without the permiſſion of the Maſter of the Rolls: *Graham* has preſumed to execute a writ without ſuch permiſſion; he is therefore guilty of a groſs contempt; and therefore let *James Graham* ſtand committed cloſe priſoner to the Fleet.

Afterwards, upon pleading ignorance, begging pardon, and promiſing never to be guilty of the like again, he was diſcharged, paying all coſts.

Welſh Copper Company v. *Moore.*

28 Nov. 1759.

AN application for a copy of interrogatories relating to a contempt denied.

Heather v. *Waterman.*

14 Feb. 1762.

The executing of a ſequeſtration on *meſne proceſs* held to be improper, and though the bill were decreed to to be taken, *pro confeſſo*, and the ſequeſtrators decreed to account, coſts were reſerved generally.

BILL for an account, and to be paid the ſum of 360 *l.* charged to be due for tithes; ſequeſtration having iſſued againſt the defendant, for want of his anſwer, ; the bill at the hearing was decreed to be taken *pro confeſſo*, and the defendant directed to account, and pay the balance; the ſequeſtration having been executed, though on meſne proceſs, the plaintiff preferred a petition, which came on at the ſame time with the cauſe, and thereby prayed that the ſequeſtrators might account, and pay the balance to him in part of his demand. Sir *Thomas Sewell* M. R. reprehended in very ſevere terms, the executing of the ſequeſtration,

Heather v. *Waterman.*

ſequeſtration, ſaying, it was very improper; that it muſt be either ignorance of the plaintiff's ſolicitor in his profeſſion, which was ſhameful, or by deſign, for the purpoſe of taking the account, for which the ſolicitor would be paid: and his Honour, though he ordered the bill to be taken *pro confeſſo*, and directed an account of the tithes, and the ſequeſtrators to account, nevertheleſs reſerved coſts.

[Note.—The decree doth not appear to have been proſecuted. J. D.]

18 March 1760.

Walker v. *Fanderheide.*

(Reg. Lib. B. fol. 119.)

A prohibition iſſues of courſe upon a proper affidavit, but the defendant muſt plead, before he applies for a prohibition.

THE defendant being arreſted at the ſuit of the plaintiff, on a writ iſſuing out of the Marſhalſea, he upon affidavit, that the cauſe of action, was not within the juriſdiction of that Court, ſued out a writ of prohibition, upon two points: Firſt, whether ſuch writ iſſued of courſe, which Lord Keeper *Henley* declared it did, upon a proper affidavit: Secondly, that the defendant ought to have pleaded, before he applied for a prohibition, which his Lordſhip held, he ought to have done; and therefore ſuperſeded the prohibition.

26 March 1760. See Vaughan v. Vaughan, ſupr. 90.

Blois v. *Betts.*

A SURETY for a receiver, having procured himſelf to be diſcharged, the receiver entered into a freſh recognizance, but the time for enrolling being elapſed, it

it was ordered to be entered *nunc pro tunc*; it was however added, that the ſame was not to take effect, if any intermediate purchaſer, or incumbrances for a valuable conſideration, of the lands of the cogniſors, but from the time of the enrolment. *Bloi* v. *Betts.*

Binfield v. *Lambert.*

22 May 1760.

A will executed and atteſted according to the ſtatute, though two only of three witneſſes could be found to be examined: the truſts were nevertheleſs ordered to be carried into execution.

IN this caſe, the will was executed by the teſtator, and atteſted by three witneſſes, agreeably to the ſtatute; and the bill prayed, that the will might be declared well proved, and be eſtabliſhed, and the truſts decreed to be performed, and carried into execution, &c.

Two of the witneſſes were examined, who proved the due execution, and atteſtation of the will, but the third witneſs could not be found, though advertiſed, of which there was proof.

At the hearing of the cauſe before Sir *Thomas Clarke* M. R. a difficulty aroſe, what the Court could do.

The plaintiff's counſel preſſed his Honour to declare the will well proved.

His Honour anſwered, that the will could not be ſaid to be ſtrictly proved, agreeably to the ſtatute; but his conſcience being ſatisfied, as to the proof of it, he would, and he accordingly did, direct the truſts to be performed, and carried into execution.

The caſe of Bird v. Butler, before Mr. Baron Eyre, ſitting for the Lord Chancellor, 5th July 1780, was circumſtanced exactly as the preceding, with this difference, that the third witneſs who could not be found, had not been advertiſed for. The judge did not declare the will well proved, but only directed the truſts to be performed and carried into execution. See alſo *Stokes* v. *Taylor*, inf. 349.

13 June 1760. Sir Thomas Clarke M. R.

Ellis v. *Unet.*

If a plea is allowed, and the cauſe goes on to hearing; the defendant is to open the caſe, as he hath nothing to do, but to verify the plea.

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6 July 1760.

A witneſs was examined at the trial of an ejectment, a new ejectment being brought, ſhe was examined to perpetuate the teſtimony upon the *ſame* interrogatories as thoſe on which the former witneſſes had been examined; and her teſtimony was ordered to be perpetuated.

James v. *Newman.*

The defendant having brought an ejectment, to recover lands deſcended to the plaintiff, the plaintiff filed his bill in this Court, to perpetuate the teſtimony of his witneſſes; the defendant anſwered, and ſeveral ancient witneſſes were examined, and publication paſſed by rule; the plaintiff at law neglected to proceed to try the ejectment, but afterwards brought another, and proceeded to a trial, and a verdict was found for the defendant at law: the plaintiff in the ſaid ejectment having brought another, the plaintiff in this Court, the defendant at law, applied to examine one *Elizabeth Favier*, aged eighty-eight, who had been examined on the ſaid trial, notwithſtanding publication had paſſed, in order to perpetuate her teſtimony. Sir *Thomas Clarke* M. R. doubting, it ſtood over till this day for conſideration; his Honour ſaid, he had conſidered Lord *Bacon*'s rules for examining witneſſes *in perpetuam rei memoriam*, and that he was of opinion, as a new ejectment had been brought, and others might be brought, and as the plaintiff might bring a new bill to perpetuate the teſtimony of any other witneſſes, to which

the former ſuit would not be pleadable, he therefore gave the plaintiff liberty to examine the ſaid *Elizabeth Favier*, on the interrogatories exhibited by the plaintiff, for the examination of her former witneſſes, and directed, that the teſtimony of the ſaid *Elizabeth Favier* ſhould be perpetuated, the ſame as if ſhe had been examined, before publication paſſed.

James v. *Newman.*

Dent v. *Wardel.*

19 July 1760.

(Reg. Lib. B. fol. 467.)

5l. coſts ordered to be paid for the length of an anſwer.

IN *October* 1758, the plaintiff exhibited his bill in this Court, conſiſting of one hundred and two ſheets, for divers matters therein mentioned, and amongſt others, for a partition of a cloſe, called the *Intack*; the defendants anſwered ſeparately; one put in an anſwer, conſiſting of ninety-ſix ſheets, the other of ninety-two ſheets. On the 5th of *February* 1760, the plaintiff obtained an order to amend, on payment of 20*s.* coſts; and amended his bill, and put in a new ingroſſment, conſiſting of no more than thirteen ſheets, praying a partition of the intack, and waiving all other matters in the original bill: the defendants by Mr. *Perrot* and Sir *Anthony Abdy* on the above 19th *July* moved, that the ſaid order of the 5th of *February* 1760, might be diſcharged, and the bill diſmiſſed with coſts, or that the plaintiff might pay unto the defendants, the coſts of their putting in an anſwer, to ſo much of the original bill, as did not relate to the partition thereby prayed: After hearing Mr. *Hoſkins* for the plaintiff, Lord Keeper *Henley* ordered,

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dered, that the ſaid order of the 5th of *February*, ſhould ſtand, on the plaintiff's payment to the defendants of the further ſum of 5 *l.* and that the defendants ſhould pay the ſame accordingly.

4 Nov. 1760.

Ex parte Ducheſs of *Marlborough.*

(Reg. Lib. B. 1759, fol. 475.)

AN order to acknowledge ſatisfaction on a ſtatute

9 Dec. 1760.

Becket v. *Becket.*

A wife's choſe in action aſſigned by the huſband to an unprovided child by a former wife, natural love and affection recited to be the conſideration, not good.

JOHN *Becket* the plaintiff's father, many years ſince intermarried with the defendant *Ann*; differences ariſing between them, ſhe withdrew herſelf, and he was obliged to retire into *Denmark*: during the time he was abroad, *Jane Jefferys* by will, gave to the defendant *Ann*, 700 *l.* South Sea annuities; but if ſhe married again, the teſtatrix gave the annuities to the defendant *Randal*, and appointed the defendants *Sleech* and *King*, executors; they proved the will, and admitted aſſets.

The plaintiff's father having left *England*, without making any proviſion for the plaintiff, (his child by a former wife), and ſuch bequeſt having been made in favour of the defendant *Ann*, he by indenture dated the 20th *April* 1750, after reciting the above bequeſt, in conſideration of natural love and affection, and of 5 *s.* transferred, and aſſigned all his intereſt in the

the ſaid legacy, to the plaintiff his ſon, and ſoon afterwards died.

The plaintiff claiming the legacy under the ſaid aſſignment, and the defendant *Ann* alſo claiming the ſame as a choſe in action; the executors filed their bill, for the indemnity of the Court.

Upon hearing that cauſe, the 29th of *July* 1754, amongſt other directions, the executors were ordered to transfer the ſaid 700 *l.* South Sea annuities, to the Accountant General, ſubject to the contingencies in the teſtator's will; and the Maſter was to enquire whether the defendant *Ann* had been deſerted by her huſband, and was left without maintenance; and whether he had made any ſettlement.

The Maſter by his report, dated the 19th of *January* 1756, certified that *John Becket* did go abroad and leave his wife, without maintenance by him, but that it did not appear, ſhe was deſerted, ſhe having declined living with him, and found that the huſband had not made any ſettlement on the defendant *Ann*, but that ſhe enjoyed a yearly income of 44 *l.* 15 *s.* under the will of her mother, for her ſeparate uſe.

On the 8th of *February* 1756, the ſaid cauſe came on to be heard for further directions, when liberty was given to the ſaid *John Becket* the ſon, and to the ſaid *Ann Becket*, to file a ſupplemental bill, to bring the right to the ſaid 700 *l.* Souh Sea annuities properly in queſtion.

John Becket accordingly filed his bill ſtating the aforeſaid aſſignment, and praying to have the aforeſaid 700 *l.* South Sea annuities, transferred to him, ſubject to the contingency of the defendant *Ann*'s marrying

Becket v. *Becket.*

again, notwithſtanding his father was dead, leaving the defendant *Ann*, his widow.

The defendant *Ann* by her anſwer inſiſted, that her ſaid late huſband, had no power over the ſaid 700 *l.* South Sea annuities, ſpecifically bequeathed to her; that her huſband being dead, and the ſaid annuities being a choſe in action not reduced into poſſeſſion, they ſurvived to her.

This cauſe came on the 4th day of *December* 1760 and ſtood for judgment till this day (*a*).

(*a*) 9 Dec. 1760.

Sir *Thomas Clarke* M. R.—The huſband and wife intermarried in 1729; it doth not appear any portion came with the wife, on any proviſion moved from the huſband.

In 1732, he received a benefit from his wife's mother, who likewiſe by her will, gave a fortune for the ſeparate uſe of the wife.

His Honour then ſtated the caſe at large, and the queſtions, and proceeded as follows: To determine this caſe, it will be neceſſary to conſider if there are any general rules, in regard to a huſband's right in the property of his wife; and if any, whether they are applicable to the preſent caſe, or whether it depends upon its own circumſtances.

If a man marries a woman with mere perſonal property in poſſeſſion, he without doubt gains a property uncontroulable.

But obſerve, what veſts in a huſband in right of the wife is, where it is mere perſonal property in poſſeſſion.

How doth it ſo veſt, where a huſband hath a legal right?

This Court will not interpoſe to prevent his receiving it.

This

But if the right be merely equitable as a legacy, and he comes into this Court to receive it, the Court will impoſe terms upon him; as appears by the caſe of *Watkins* v. *Watkins* (*a*); and in *Wiſeman* v. *Wiſeman* (*b*), decided by Lord *Hardwicke* C., his Lordſhip directed the huſband to make a ſettlement; the wife died before a ſettlement, the Court interpoſed for the children. *Becket* v. *Becket*.

(*a*) 2 Atk. 96.
(*b*) 10 Nov. 1740.

Conſider how it ſtands on the death of a huſband, as in the preſent caſe.

It will be proper to make a diſtinction between what veſts in him, in right of the wife, and what in his own right.

The diſtinction is, that what veſts in the huſband in right of the wife, if it hath no ear mark, will go as his own perſonal eſtate.

But if it be ſpecific, and not reduced into poſſeſſion, the huſband and wife will be conſidered as joint tenants, and it will go to the ſurvivor; his Honour then cited *Pit* v. *Hunt*, 1 *Vern.* 18; *Gray* v. *Kentiſh*, 21 *July* 1749 (*c*), in the Book of Entries, fol. 522. and aſſimilated thoſe caſes, to the preſent caſe.

(*c*) 1 Atk. 280.

I do not know, continues his Honour, where a voluntary aſſignment hath prevailed, and cited *Bate* v. *Bate* by Lord *Hardwicke* C., but not the date.

It is ſaid, this legacy is to be conſidered as reduced into poſſeſſion, by being brought into Court; the tranſferring of the annuities to the Accountant General, in truſt in the cauſe, is only, as it were, changing the truſtees; and the fund ſtill remains, ſubject to the ſame equity.

Therefore as between the plaintiff, and the defendant *Ann Becket*, I am of opinion, the plaintiff is not entitled, and let the bill be diſmiſſed.

26 Jan. 1761. Sir Thomas Clarke M. R.

Hill v. *Price.*

A COMMON decree of foreclosure, and the defendant in case of a foreclosure, was to surrender the mortgaged premises which were copyhold, at the expence of the plaintiff.

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4 March 1761.

Sprackling v. *Ranier.*

Legacy given to children of A. lawfully begotten or to be begotten, does not extend to children born after the death of the testator.

"GEORGE *Martin* by his will, dated 13th *March* 1743, gave 600 *l.* to *George Hooper* in trust, to place out at interest, and to pay the interest, to his the testator's son *George*, during his life, and after his death, then he gave the said 600 *l.* to the sons and daughters of his son *George*, and their children, in case any of them should be then dead leaving issue, equally between them at their respective ages of eighteen years, with the interest then due for the same; but so as the child or children, of such of the said sons or daughters, as should happen to be then dead, should be entitled only to the share his or their father, or mother would have been entitled to, if living", and if the said testor's son *George* should die without lawful issue, then he gave the said 600 *l.* to the sons and daughters of his the testator's *daughter, Mary Sprackling, lawfully begotten, or to be begotten*, and their children, in case any of them should be then dead, leaving issue equally to be divided between them, at their respective ages of eighteen, together with the interest due for the same, but so as the child or children of the son or daughter so dying, should not be entitled to more than the share of his father or mother, if living.

George

George the ſon died in the life-time of the teſtator, without iſſue.

At the time of the death of *George* the ſon, the teſtator's daughter, *Mary Sprackling*, had three children, the plaintiffs *George*, *Martin*, and *Stephen*. *Stephen* died before eighteen, and the plaintiff *George* took out adminiſtration to him.

The ſaid *Mary Sprackling*, after the death of her brother *George*, had another child born, the defendant *Mary Sprackling*.

The plaintiffs filed their bill to be paid the ſaid 600*l.* in excluſion of the defendant *Mary*.

On the part of the defendant *Mary* it was inſiſted, that under the contingent bequeſt to the ſons and daughters of *Mary Sprackling* lawfully begotten, *or to be begotten*, every child lawfully begotten and born of the ſaid *Mary Sprackling* was entitled to a ſhare; and in ſupport of it the following caſes were cited by Mr. *Conyers*: *Cook* v. *Cook*, 2 *Vern.* 545; *Rolt* v. *Jackſon*, in King's Bench, *March* 1742.

Sir *Thomas Clarke* M. R.—The Court will ſometimes extend the word "then living," to thoſe living at the time of the will, but never further than the death of the teſtator; and the ſaid *George* the ſon having died in the life-time of the teſtator, and the defendant *Mary* being born after the death both of the ſon *George*, and *George* the teſtator:

Declare the 600*l.* veſted in point of right only in ſuch of the children of the teſtator's daughter, *Mary Sprackling*, as were living at the death of the teſtator's ſon *George*; that is to ſay, in the plaintiff *George* as to one third part; in *Stephen Sprackling* deceaſed, as to one

Sprackling v. *Ranier.*

one other third; and in the plaintiff *Martin* as to the remaining third. And directions were given for payment accordingly.

5 May 1761.

Lancaſter v. *Thornton.*

BILL by an infant: the cauſe heard, and a decree made. Afterwards the *prochein amy* died. The plaintiff's ſolicitor refuſing to name a new *prochein amy*, the defendant petitioned, and obtained an order that the infant ſhould, in ten days after notice to his Clerk in Court, procure a perſon to be appointed his *prochein amy* to proſecute the cauſe, or that the defendant ſhould be at liberty to name a proper perſon as his next friend for that purpoſe.

His Honour Sir *Thomas Clarke* cited a like order by Lord *Hardwicke* C. in *Ludolph* v. *Saxby*, in 1742.

28th May 1761.

Lawſon v. *Laude.*

Parol evidence offered to prove, that a particular eſtate was left out of a leaſe, under an agreement by the joint direction of both parties, refuſed, and the bill diſmiſſed.

BILL was brought to carry into execution an agreement between the plaintiff, and the defendant, for granting to the defendant a leaſe of the farm in queſtion, and that the defendant may execute the leaſe.

The defendant objected to execute the leaſe, for that the land called *Oxlane* was left out of the leaſe.

Evidence was offered by the plaintiff to prove that it was left out by the particular and joint direction of the plaintiff, and defendant, but the evidence was objected to.

Sir

Lawſon v. Laude.

Sir *Thomas Clarke* M. R.—The plaintiff is owner of the eſtate in queſtion; agreed with the defendant for letting it to him for a term of nine years, at a certain rent; particular premiſes, namely, *Oxlane* land, were afterwards detained by the plaintiff, though in the tenure of the defendant before, and being convenient for him.

The plaintiff inſiſts, *Oxlane* land was to be detained by him, and he was to give up two acres in another place: the defendant inſiſts he was to have both.

By the Statute of Frauds, parties are not to be bound but by an agreement in writing.

What are the rules of a Court of Equity? It will permit a defendant to plead in bar of a diſcovery of an agreement.

If there is fraud attending an agreement, this Court will let in parol evidence.

Nothing of that kind appears in the preſent caſe. The queſtion is, whether there hath been a partial execution of the agreement; and if there hath, the Court will decree a performance. This bill is to carry the agreement into execution.

The agreement is for a leaſe of the farm: there is no exception of *Oxlane* in the agreement.

The evidence attempted to be read is to prove that the *particular* of the lands in which *Oxlane* was left out, was taken by the joint direction of the plaintiff and the defendant. It is directly in contradiction to the Statute of Frauds: therefore allow the objection, and let the bill be diſmiſſed.

Sparrow

Trin. 1759.

Sparrow v. *Fiend.*

COMMISSION of partition decreed to divide a manor, in Trinity 1761.

Heard on the commiſſioner's certificate.

So in *Lay* v. *Cox*, Mich 1772.

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24 June 1761.

Foſter v. *Strange.*

THE bill was that the defendant might account for one moiety of the profits ariſing by the ſale of the teſtator Sir *John Strange*'s manuſcript books, and pay what ſhould be found to the plaintiff, as adminiſtrator of *Matthew Strange*, one of the ſons of the ſaid Sir *John Strange*, to whom, and the defendant they were given by the ſaid Sir *John Strange* as joint tenants.

The following caſes were cited: *Tottingham* v. *Stevenſon*, 4th *July* 1720; *Willing* v. *Baine*, 3 *P. W.* 113; *Wheeler* v. *Horne*, Trinity, 13 & 14 *Geo.* II. (*a*)

14 Vin. Abr. 513.

Sir *Thomas Clarke* M. R. declared, that under the circumſtances of the caſe, the acts done by the defendant were tantamount to a ſeverance of the joint tenancy.

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26 June 1761.

Hall v. *Chapman.*

Original bill diſmiſſed for want of proſecution after the plaintiff had become a bankrupt, his aſſignees neglecting to revive.

THE plaintiff, after the defendant had anſwered, became a bankrupt. His aſſignees not filing a ſupplemental bill in nature of a bill of revivor, the defendant obtained the common order to diſmiſs the bill for

for want of profecution, and proceeded to tax the coſts, and the Maſter made his report. The plaintiff *deſired time*, and *promiſed* to pay the coſts; but this day applied to diſcharge the order for diſmiſſing the bill as irregularly obtained, after the plaintiff had become a bankrupt. If it were irregular, which Sir *Thomas Clarke* M. R. ſeemed to think it was, yet, as he had aſked for time, and had promiſed to pay, he had waived the irregularity; and upon Mr. *Sewel*'s mentioning the caſe of ex parte *Berry* (*a*), his Honour denied the motion.

Hall v. *Chapman*

(*a*) Reported ſupr. 81.

Stokes v. *Taylor*.

10th Dec. 1761.

THE object of the bill was, to eſtabliſh the will of *Richard Taylor*, and to carry the truſts into execution.

Will though proved *per teſtes*, not declared well proved in the abſence of the heir, but decreed to be eſtabliſhed.

The *will was proved per teſtes*. The *heir at law* not being to be found, Sir *Thomas Clarke* M. R. would not declare the will well proved, becauſe the heir at law was abroad, and not to be found, but declared it ought to be eſtabliſhed (*a*).

(*a*) See ſupr. 337. Binfield v. Lambert.

Flower v. *Herbert*.

13 Dec. 1761.

INJUNCTION granted on the merits, and the plaintiff was ordered to ſpeed his cauſe: he replied the term following, but proceeded no further. The defendant applied to diſſolve the injunction.

If a plaintiff replies, defendant may rejoin *gratis*, and give rule to produce witneſſes.

Lord *Hardwicke* C. ſaid, as the plaintiff had replied the defendant might rejoin *gratis*; and if the plaintiff neglected

Flower v. *Herbert.*

neglected within the next term to give a rule to produce witneſſes, the defendant might the term following; and therefore refuſed the motion.

This all the Bar, and the clerks in Court, thought to be againſt rule; and his Lordſhip in *Bennet* v. *Leigh* was of a quite contrary opinion. J. D.

22 Jan. 1762.

Took v. *Clark.*

BILL decreed to be taken *pro confeſſo* againſt huſband and wife, on 22d *January* 1762: re-heard on the petition of the wife, the huſband being dead.

13 Feb. 1762.

Ex parte *Champney.*

THE ſurviving teſtamentary guardian of the petitioner declining to take upon himſelf the guardianſhip, it was referred to the Maſter to approve of a proper perſon to have the care of the maintenance, and education of the petitioner. It had ſtood over, Sir *Thomas Clarke* M. R. having a doubt whether ſuch an application could be entertained without a bill.

7 March 1762.

Titterton v. *Oſborne.*

THE bill was filed by ſeveral plaintiffs. The defendants having anſwered, the plaintiffs replied, and the cauſe was at iſſue. On the above day one of the plaintiffs applied to amend the bill by ſtriking out his

his name, upon this ground, that till then he was ignorant of the ſuit, and that his name was inſerted without his knowledge, privity, or conſent. The defendants oppoſed the motion, for that he was the only plaintiff of ability to anſwer the coſts.

Titterton v. *Osborne.*

Lord *Northington* C. held the objection to be good, but ordered the notice to be ſaved until the hearing of the cauſe: that in caſe the plaintiffs ſhould be ordered to pay coſts, one *William Goodin* the ſolicitor, who inſerted the ſaid plaintiff's name, might be ordered to indemnify him; at the ſame time ſaying, that were he to grant the motion, it would tend only to derange the cauſe, and impede the hearing.

Yeomans v. *Kilvington.*

In the Exchequer. 7 April 1762.

BILL for an account of land ſold, and the money produced by the ſale, and to ſet aſide a note of hand; and for an injunction. On hearing, it was referred to the remembrancer to take an account of what was due. He reported 6*l.* 6*s.* to be due to the plaintiff. On hearing for further directions, the defendant was directed to pay the money reported due, and to deliver up the note, and to pay the plaintiff his coſts to be taxed, and the injunction before granted to be perpetual. The note was delivered up, and the balance was paid; but before the coſts were taxed, the defendant died; on which the plaintiff filed his bill againſt the executor of the defendant to revive the ſuit, charging that the note had not been delivered up, and that the defendant threatened to bring a freſh action

A perpetual injunction having been decreed, it is not neceſſary, upon an abatement, to file a bill of revivor merely to keep on foot the injunction.

Yeomans v. *Kilvington.*

action on it. The defendant by his anſwer denied he had the note, and believed it was delivered up purſuant to the decree; and denied threatening to bring an action, and diſclaimed any benefit from the note. The Court diſmiſſed the bill without coſts.

Eaſt. Term 1762.

Jones v. *Donithorne.*

A WITNESS was examined *de bene eſſe* on a commiſſion *ex parte*, and died before he was examined in chief: the commiſſion was returned, but *loſt*. An order was made on the commiſſioner in whoſe cuſtody the paper draught of the depoſition remained ſealed, to return the ſame unopened, and that the ſame ſhould be delivered to the Six Clerk unopened, and be engroſſed, and that ſuch engroſſment ſhould be filed, and made uſe of as the original depoſition might have been.

Eaſt. Term 1762.

Cotes v. *Lindſay.*

THE defendant, abroad in the King's ſervice, brought his action againſt the plaintiff. The plaintiff filed his bill for an injunction, and obtained the common order for an injunction, with liberty to proceed to trial, but with a ſtay of execution. The defendant proceeded to trial, and obtained a verdict for 4000 *l.* and coſts; and on affidavit of the danger of his loſing his debt, obtained an order for the plaintiff to pay the money recovered againſt him into Court by a day fixed, or the injunction to be diſſolved.

Hockly

Hockly v. *Lukin.*

Trin. 1762.

A BILL having been filed againſt an infant, his father, to prevent his being ſerved with a ſubpœna, ſecreted him. On application, Lord *Northington* C. ordered the father to diſcover where the infant was, that he might be ſerved.

Brown v. *Terroway.*

6 July 1762.

THE object of the bill was, that the defendant might complete his purchaſe, and pay the reſidue of his purchaſe money, and that the defendant *Ford*, a mortgagee, might execute on being paid what was due to him.

The opinions of Counſel read as evidence.

At the hearing of the cauſe, the opinions of Counſel were offered to be read; and objected as improper.

Sir *Thomas Clarke* M. R.—It is not uſual to read the opinions of Counſel, but in a caſe circumſtanced as this is, it is proper; therefore let them be read: and the opinions of Mr. *Rivet*, and Mr. *Robert Bicknel* were read accordingly.

Clarke v. *Burgoine*, et è contra.

12 & 13 Nov. 1767.

THE teſtator, by his will, gave to his daughter two legacies of 3500 *l.* and 3500 *l.*

2000 l. paid by the teſtator on the marriage of his daughter, with a covenant to pay 4000 l. more on his death, an extinguiſhment of two legacies given by the will to his ſaid daughter.

Clarke v. *Burgoine*, et è contra.

After making his will, the teſtator, on the marriage of his daughter, paid 2000 *l.* in part of her portion, and covenanted to pay 4000 *l.* on his death.

The bill was, to be paid the ſaid legacies.

On the other ſide it was inſiſted, that the proviſion made by the teſtator for his daughter on her marriage was a ſatisfaction of the ſaid legacies. The following caſes were cited: *Johnſon* v. Sir *Edward Smith*, in 1749 (*a*); *Jenkins* v. *Powel*, 2 *Vern.* 115; *Blandy* v. *Widmore*, 1 *P. W.* 324; *Wilcox* v. *Wilcox*, 2 *Vern.* 558; *Hartop* v. *Whitmore*, *Prec. Ch.* 541; *Ward* v. *Lant*, *Prec. Ch.* 182.

(*a*) 1 Veſ. 314.

Lord *Camden* C. declared, that the having advanced a portion of 6000 *l.* on the marriage of his daughter; 2000 *l.* *in præſenti*, and 4000 *l.* at his death, the legacies given by his will were extinguiſhed, and revoked.

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1 Dec. 1762. Vid. ſup.

Vaughan v. *Williams*.

BILL decreed to be taken *pro confeſſo* on a ſequeſtration for want of the defendant's anſwer, and the defendant decreed to pay to the plaintiff 770 *l.* received for his uſe. The ſequeſtration had been executed.

Sir *Thomas Clarke* M. R. held it to be unneceſſary, and improper.

Coveny

Coveny v. *Athill.* 20 Dec. 1762.

(Reg. Lib. A. fol. 33.)

THE plaintiff brought his bill to perpetuate the teſtimony of his witneſſes. The defendant ſtood out all proceſs of contempt, and was brought up on an *alias pluries habeas corpus*, for want of his anſwer, and the plaintiff's clerk in Court attended with the record of the bill, to have the ſame taken *pro confeſſo*: but the plaintiff by his bill praying no relief, and as he, by the defendant's perſiſting in his contempt, was prevented ſerving a ſubpœna to rejoin, and bringing the cauſe to iſſue, whereby he was in danger of loſing the benefit of his witneſſes,

Sir *Thomas Clarke* M. R., after taking time for conſideration, gave the plaintiff leave to ſue out a commiſſion to examine the witneſſes, though no anſwer were come in.

Aaderly v. *Smith.* 7 Feb. 1763.

THE plaintiff, under the protection of a foreign ambaſſador, ordered to give ſecurity to anſwer coſts.

Attorney General v. *Powel.* 17 Nov. 1763.

A NEW relator named in the room of a deceaſed relator.

25 April 1763.

Townſend v. *Barber.*

If one executor poſſeſs part of his teſtator's eſtate, and pays it over to another executor, who embezzles it, the former, or in caſe of his death, his aſſets ſhall make it good.

THE bill was brought for an account of the teſtator's perſonal eſtate, and to have the reſidue paid, or ſecured for the defendants; and that the repreſentative of *Speed*, one of the executors, might anſwer any loſs the eſtate ſuſtained through his neglect, or miſconduct.

The teſtator, by his will, appointed three executors: they all proved. *Speed* principally acted, and poſſeſſed the eſtate, and, among other particulars, fourteen *Eaſt India* bonds, which he permitted one other of the executors to get into his poſſeſſion, who diſpoſed of them, and afterwards became a bankrupt, whereby they were loſt to the teſtator's eſtate. The cauſe was in hearing ſeveral days: it ſtood this day for judgment.

Sir *Thomas Clarke* M. R.—The principal queſtion in this cauſe relates to fourteen *Eaſt India* bonds.

Whether, under the circumſtances of the caſe, the aſſets of *Speed*, one of the executors who poſſeſſed them, are to make ſatisfaction for thoſe bonds.

In order to determine this point, it is neceſſary to ſee whether there is any general rule with reſpect to caſes of this kind.

The meaning of a perſon's appointing more executors than one is, that they may be a check, or a caution to each other.

And I take it to be a general rule, that where one executor receives the whole, or part of his teſtator's eſtate, and pays it over voluntarily and unneceſſarily to his co-executor, and the ſame is embezzled; if embezzled

embezzled, or loſt, he who ſo paid it over is anſwerable.

If this is a general rule, it is highly reaſonable.

If there are twenty executors, each is independent, and not anſwerable to the other.

If ſo, let us conſider the preſent caſe, and ſee if it falls within that rule.

The teſtator appointed three executors; one his couſin, another his agent in his trade, the third *Speed*, his riding partner: his view was, that the whole ſhould fall into the hands of *Speed* his partner.

Speed poſſeſſed the teſtator's effects, and, according to the above rule, had a right to keep poſſeſſion; and it was not neceſſary to pay any part of it to *Wilſon*, another of the executors.

Part of the eſtate of the teſtator conſiſted of fourteen *Eaſt India* bonds, which *Speed* poſſeſſed, and afterwards permitted *Wilſon* to take, and carry away.

Wilſon afterwards became bankrupt, and the bonds are loſt.

The great queſtion is, who is to make them good to the eſtate?

And I am of opinion, that *Speed* having poſſeſſed them, and having voluntarily, and unneceſſarily parted with them to *Wilſon*, whereby they are loſt, the aſſets of *Speed*, according to the rule before laid down, are to make them good. Caſes have been cited, but caſes of this kind depend on their own foundation. His Honour mentioned a caſe of *Ridout* v. *Bickerton*, but did not ſay where it is reported.

And in directing the accounts, ordered the value of the bonds, as if exiſting, to be anſwered out of

Townſend v. *Barber.*

Speed's aſſets, but without prejudice to any remedy the executors of *Speed* might have againſt the aſſignees of the bankrupt executor.

22 March 1763.

Vernon v. *Cue.*

Bill amended after plea ſet down, on payment of 20 s. coſts, and 5 l. for the plea.

THE defendant pleaded, and the plea was ſet down to be argued. On the 28th of *October* 1759, the plaintiff obtained an order to amend his bill on payment of 20 *s.* coſts.

The defendant applied this day to diſcharge the order for irregularity.

Lord *Northington* C.—Upon payment of 20 *s.* coſts for the amendment, and 5 *l.* for ſetting down the plea, let the order ſtand.

10 May 1763.

Darling v. *Staniford.*

Depoſition of a witneſs rectified, having been firſt examined in Court.

THIS came on upon a petition of *John Briſon*, a witneſs, examined to the plaintiff's interrogatories, to rectify his depoſition; complaining that the Examiner had miſtaken what he ſaid, and taken his examination contrary to it; of which he made affidavit, and therefore prayed to have the examination rectified.

It was ſtrongly oppoſed.

Sir *Thomas Clarke* M. R.—As this hath been ſo much laboured, it is neceſſary to ſee what is the examination. The complaint is, that the Examiner hath miſtaken the words and meaning of the witneſs.

The

Darling v. *Staniford.*

The Examiner writes in my name, and is, and acts as my deputy; he is the ſame as the perſons in the *Roman* law called *eo-judices*. If they take an examination ſhort, it is uſual for the Court to take the examination into their own hands, and examine the witneſs. In the preſent caſe, *John Briſon* the witneſs attended in Court, and was examined; and his Honour being ſatisfied, ordered the depoſition to be amended according to the prayer of the petition, and the witneſs to reſwear it after the amendment.

Kelly v. *Powlet.*

18 May and 7 June 1763. Amb. 605. S. C.

Lavinia Diſs of *Bolton*, by her will, dated the 6th of *December* 1759, gave to the defendant her *houſehold furniture and farming utenſils* at her houſe at *Weſtcomb* at the time of her death, and appointed the plaintiff ſole executor and reſiduary legatee.

Queſtion whether plate, china, and linen were comprised in a bequeſt of houſehold furniture.

The plaintiff inſiſted that houſehold furniture and farming utenſils did not comprehend plate, china, linen, books, pictures, and other valuable effects of the teſtatrix, at *Weſtcomb*, and therefore filed his bill to have the plate, &c. delivered to him.

The teſtatrix was poſſeſſed of a large quantity of plate, great part whereof ſhe kept locked up, and uſed only other part of it; and therefore it was contended, that if what was in uſe was to be conſidered as houſehold furniture, yet it certainly did not include that part which was not in uſe.

On the part of the plaintiff, the following caſes were cited: in *Harvey* v. *Badcock*, 25th *July* 1750, by the

Kelly v. *Powlet.*

Maſter of Rolls, it was held that books did not paſs by the deſcription of houſehold goods and furniture; and ſo likewiſe in *Bridgman* v. *Dove*, in 1744 (*a*), *Swinburn of Teſtaments*, part 7, page 415; *Jeſſon* v. *Eſſington*, *Prec. in Ch.* 207: In *Gulliford* v. *Devineſh*, 26 *Nov.* 1718, it was ſent to the Maſter to ſee what was in general uſe: *Le Farrant* v. *Spencer*, 14th *June* 1748 (*b*); *Frankland* v. Lord *Burlington*, *Prec. in Ch.* 251.

(*a*) 3 Atk. 201.

(*b*) Vef. 97.

On the part of the defendant the following caſes were cited: *Maſters* v. *Maſters*, 1 *P. W.* 421; *Nichols* v. *Oſborn*, 2 *P. W.* 419; *Budgel* v. *Elliſon*, 1731.

The cauſe ſtood till this day for judgment.

Sir *Thomas Clarke* M. R.—The queſtion in this cauſe ariſes on the ſpecific bequeſt to the defendant of the teſtatrix's houſehold furniture and farming utenſils, which ſhall be within and upon the premiſes at her death.

At that time, plate, china, library, a teleſcope, pictures, linen, &c, were in and upon the premiſes.

The queſtion is, which and how many of theſe things paſſed, or may be ſaid to paſs by the will?

The chief of the diſpute concerns the plate, and concerning the meaning and extent of the word furniture.

In the firſt place, therefore, I ſhall conſider what is the meaning and import of that word.

It is as general a word as can be made uſe of, incapable of a definition, and only of a deſcription. It comprizes every thing that tends to the uſe or convenience of a houſeholder or occupier of a houſe.

In

In the next place, what is the meaning of the word when accompanied with other circumſtances; and in that light I ſhall conſider the preſent caſe. *Kelly* v. *Powlet.*

The circumſtance of rank, and family is very material.

Suppoſe a perſon of rank and family purchaſes a ſervice of plate, and dies without uſing it, I ſhould have no doubt that it paſſed under the word furniture.

But plate will always paſs wherever it is mentioned in the will of a teſtator.

If a tradeſman hath purchaſed a ſervice of plate, ſuch part of it as is in common uſe, and ſuitable to his rank, will paſs, but not ſuch as is above his rank.

In *Nichols* v. *Oſborn*, 2 *P. W.* 400, plate did paſs, but a library of books did not. *Bridgman* v. *Dove* warrant this opinion, and that a teleſcope doth not paſs.

But china and linen I am of opinion do paſs; they are what are in uſe, and for the conveniency of a houſeholder: but the library of books, ſilver ſundial, camera obſcura, teleſcope, globes, and caſe of butterflies, are not ſuch articles as are in uſe, or in any reſpect neceſſary or convenient for a houſeholder, and therefore declare the plaintiff is entitled to thoſe articles as not compriſed in the ſpecific bequeſt to the defendant, but as part of the general reſidue of the teſtatrix's perſonal eſtate.

And alſo declare, that according to the true meaning and conſtruction of the will of the teſtatrix, and by virtue of the ſpecific bequeſt, the defendant is entitled to the plate, houſehold linen, china, whether uſeful

Kelly v. *Powlet.*

useful or ornamental, existing at the house at *Westcomb* at the death of the testatrix.

As to pictures, whether hung up or in cases, the plaintiff present in Court admitted that the defendant was entitled to them.

21 April 1763.

Pauncefort v. Earl of *Lincoln.*

The dates and general purport of wills, &c. under which the plaintiff claimed being only stated in the bill by way of reference, it was referred to the Master to state a case of the rights claimed by the plaintiff under the several instruments.

THE plaintiff's claims were founded on a variety of deeds, wills, and other instruments; to avoid expence, or for some other purpose of the solicitor, a Mr. *Wharton*, the dates and general purport only of the deeds, &c. were stated in the bills, with reference to them.

When the cause was brought on to hearing, his Honour said, were he to make a decree, there was not any thing upon the records of the Court on which to found it, and therefore referred it to a Master to state a case of the rights claimed by the plaintiff under the several deeds, &c. mentioned in the bill, and reserved costs and further directions until after the report. The cause was afterwards heard on the report, which stated the deeds, &c. and a decree was made.

14 June 1763.

Allen v. *Allen.*

REPORT pursuant to a decree: no objection was taken to the draught, and the report was confirmed.

The cause came on this day to be heard for further directions on the report,

After

After hearing the decree and report read, Sir *Thomas Clarke* M. R. ordered the cauſe to ſtand over, with liberty for the plaintiff to take exceptions to the report, as if he had taken exceptions to the draught. *Allen* v. *Allen*.

Attorney General v. Lord *Foley*.

26 June 1753.
2 Bro. P. C. 368.
S. C.

THE relators had erected a chapel of eaſe on ſome land, of which they were in poſſeſſion under a leaſe. The owner ſaw it in the courſe of the building, and made no objection.

A perſon's building a chapel on lands of which he had a leaſe, and the owner ſtanding by and ſeeing it built, without obſtructing it, does not give the former a right to the chapel, or to nominate.

The information was to eſtabliſh the right to the chapel, and to have the right of nominating a curate to officiate in it, and to eſtabliſh the nomination that had been made by one *Collins*.

It was argued on the part of the relators, that having built the chapel, and the owner of the lands ſtanding by and not obſtructing them, it was now too late to ſet up a claim to it: that it was for public ſervice, and muſt be ſuppoſed to be given up to the public; as, where a man, owner of ground, erects buildings in the nature of a ſtreet, it is ſuppoſed to be for the benefit of the public, and he cannot afterwards ſtop the way.

And the caſe of the Attorney General v. *Brereton* (*a*) was cited. (*a*) 2 Veſ. 425.

On the part of the defendant, Lord *Foley*, it was argued, that he had purchaſed of Lord *Abergaveney* the ſoil on which the chapel was erected.

The queſtion therefore was, whether Lord *Foley* has a right to the chapel; and if ſo, whether he had

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not aright to nominate a curate to officiate in the chapel, or to remove him from it.

Lord *Foley* purchaſed the ſoil of Lord *Abergaveny*, and has the ſame right as Lord *Abergaveny* had. If he were entitled to the ſoil, he was entitled to whatever was built on it; and if he had ſuch right, he had a right to diſpoſe of it, which he hath done.

The ſoil certainly belongs to Lord *Foley*, unleſs Lord *Abergaveny* hath done ſome act to diveſt himſelf of that right.

It was inſiſted by the plaintiff, that as Lord *Abergaveny* ſuffered the chapel to be built, and was privy to it, he deſigned it for a public benefit, and cannot now reclaim it.

So, if a man lays out buildings in the nature of a ſtreet, it is ſuppoſed to be for the benefit of the public; it will be ſo for ever, and an action of treſpaſs will not afterwards lie againſt paſſengers.

But the plaintiff muſt ſhew he had a title to the ſoil at the time he built the chapel. It is true, he had a temporary title by virtue of a leaſe, but that doth not give him a title after the leaſe is expired.

So Lord *Coke* ſays in 7 *Rep.*; and Lord *Coke* in 3 *Inſt.* 203, ſays, "Albeit people build chapels, yet it is neceſſary, before they are properly called ſo, that they ſhould be conſecrated."

This chapel hath not been conſecrated by the biſhop, conſequently it is no chapel, but lay property, and muſt belong to a layman; if ſo, to whom more properly than to Lord *Foley*, the purchaſer?

A chapel of eaſe hath a diſtrict: that diſtrict is obliged to keep it up; this is not ſo: who is to repair it?

And

And if a chapel of eaſe, the parſon is to nominate. So held in *Hobart* 66, 67.

Lord *Hardwicke* C.—The firſt queſtion, and fundamental point of this ſuit is to eſtabliſh a right to the building and ſoil, as a perpetual chapel, for the uſe of the inhabitants; and unleſs that point be eſtabliſhed, all the reſt falls to the ground.

If that is eſtabliſhed, then the other queſtion will ariſe, whether Lord *Foley* hath a right to nominate a curate; and if to nominate, whether he hath not a right to remove.

And then another queſtion will ariſe, as to eſtabliſhing the nomination of Mr. *Collins*.

I will, for the preſent, ſuſpend my judgment upon the fundamental point, and give my opinion upon the latter queſtion.

Firſt: If it be conſidered in the light of a private chapel, it ſeems to me that Lord *Foley* hath a right to nominate.

The chapel hath been erected *thirty-four years*: in all this time five curates have been appointed: no other proof of nomination but that of Mr. *Collins*, which is a particular caſe. What was done by Mr. *Le Hant* carries with it the appearance of a nomination.

That is the only evidence of nomination to this chapel; and after this length of time I muſt conſider the patron to have the nomination.

It is true, if there is no contract or writing to the contrary, the rector or vicar will have it. Suppoſing it to be an eſtabliſhed chapel, if Lord *Foley* had once nominated, I could not have removed his nominee.

The next queſtion is, in reſpect to the licence by the Biſhop of *Hereford*. That licence determined at his death:

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death: the words are "at my pleaſure." All leaſes at will determine at the death of the grantor.

Now as to the fundamental point, whether the informants have a right to have the chapel eſtabliſhed:

And that depends upon the queſtion, whether the owner of the inheritance of the ſoil, by acts done by, or acquieſced in by him, gives a right to the inhabitants of a village to erect a chapel for divine worſhip on his ſoil, and gives ſuch a right as to eſtabliſh it againſt him.

But that is not this caſe.

This caſe is very different from that of the Attorney General v. *Brereton* which hath been cited, there being in that caſe an endowment of part of the tythes.

The plaintiffs do not pretend to any right or grant, but only that Lord *Abergaveny* knew of the building, and did not obſtruct it.

It hath been argued, that where a perſon in poſſeſſion of land builds a houſe on it, and the perſon who hath the legal eſtate permits him to build, and takes no notice of his right, the Court will not permit him afterwards to make uſe of ſuch right to claim the houſe.

Next it is inſiſted, that the chapel ought to be conſidered for the uſe of the public; as if an owner lets his land be uſed as an highway, he cannot afterwards ſhut it up.

As to the firſt ground, this is by no means a caſe within that rule: for in this caſe the inhabitants knew their title, and upon that title only they built; whereas it is requiſite, to have the benefit of the rule, the party ſhould build on an apprehenſion the eſtate was his own.

It

It is of no ſignification that the place on which the chapel is built was a place that was uſed for ſport: all places near towns will be uſed as ſuch at times: beſides, the ground appears to have been on leaſe from the year 1664.

There is not a ſufficient foundation to determine on Lord *Abergaveny*'s permitting the lands to be built on, that he forfeited, or loſt his right. If it is not to be conſidered in that light, then it is ſaid, it ought to be conſidered as a donation; Lord *Abergaveny*'s having permitted the land to be uſed and built upon for public uſe.

The caſe of leaving lands for ſtreets, or public highways bears ſome analogy to this caſe; but there is a manifeſt difference: the ſhutting up of an highway is an annoyance to the public, and no contract can be made.

The inhabitants contracted with *Cheltenham* for a leaſe, and got it: what occaſion for any other right?

The queſtion, therefore, that remains, is, whether the permiſſion or non-obſtruction of Lord *Abergaveny* to erect the chapel for public uſe is a donation.

I am of opinion it is not. There is alſo another objection to it's being ſo conſidered: Lord *Abergaveny* had no eſtate in him to do it, he having only an eſtate tail.

I ground myſelf on the anſwer to the other points made by the relators, and the letter of the 2d *October* 1719, is a very ſtrong piece of evidence againſt the relators, it being not four months after the leaſe: for it is plain Lord *Abergaveny* expected the inhabitants to treat with him, to take ſome grant, and to make ſome acknowledgment.

In

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In ſhort, it is my opinion, that a perſon, the owner, ſtanding by, and ſeeing a building go on, though for public ſervice, is not a ſufficient ground in equity to eſtabliſh a right againſt him. And therefore let the information be diſmiſſed.

28 June 1763.

Sykes v. *Meynal.*

Huſband, by ſettlement after marriage, conſidered a purchaſer of a mortgage belonging to the wife, not reduced into poſſeſſion.

THE defendant *Ann Holden* was married to three huſbands; the firſt entitled to the mortgage in queſtion: he died, and appointed the defendant *Ann his executrix* and reſiduary legatee. She afterwards married *Samuel Burton*: he made a ſettlement on her and died; but the mortgage was not reduced into poſſeſſion. She afterwards married *Thomas Holden*; and he died. *Samuel Burton* died inteſtate: the plaintiff, his ſole next of kin, brings his bill to have the benefit of the ſaid mortgage, inſiſting that though it were not reduced into poſſeſſion, *Burton* became a purchaſer by the ſettlement.

Two points were made by the plaintiff in the cauſe:

Firſt, whether, by a ſettlement before marriage, the huſband became a purchaſer of a mortgage that belonged to his wife, not reduced into poſſeſſion:

Secondly, if a ſettlement after marriage made any difference.

Sir *Thomas Clarke* M. R.—The ſingle queſtion in this cauſe is, whether a mortgage to the firſt of three huſbands of the defendant *Ann Holden*, of whom ſhe was executrix and reſiduary legatee, is a choſe in action not reduced into poſſeſſion, or by any act done on the marriage of the defendant *Ann* with the ſaid *Samuel*

Samuel Burton, or ſince by ſettlement it belonged to the ſaid *Samuel Burton*.

In this caſe it depends on a ſettlement after the marriage. The property *Ann* was entitled to is part of the conſideration of the ſettlement, though it might not have been good againſt creditors, it is good againſt the wife.

In *Jones* v. *Marſh*, decided by Lord *Talbot*, a very inconſiderable ſum came to the wife after the marriage by a collateral relation, in conſideration of which the huſband made a ſettlement of all his eſtate: it was held good, though againſt creditors.

There was another caſe of this kind in 1742 or 1743; I mean the caſe of *Lanoy* v. Duke of *Athol* (*a*).

(*a*) 2 Atk. 444.

I am of opinion, therefore, that Mr. *Burton* was a purchaſer of his wife's intereſt in the mortgage:

And therefore declare, that *Samuel Burton*, by virtue of the ſettlement made by him on the 21ſt of *October* 1743, became entitled to the mortgage in queſtion: and let an account be taken of what is due on it; and declare the plaintiff is entitled to one moiety, as ſole next of kin of *Samuel Burton*, who died inteſtate; and that the defendant *Ann Holden*, his widow, is entitled to the other moiety.

19 July 1763.

Herle v. *Greenbank.*

Unleſs intereſt be reſerved by the decree, the Court cannot give it; but the cauſe was reheard merely to introduce a reſervation of intereſt.

INTEREST not being reſerved by the decree, upon hearing the cauſe for further directions on the Maſter's report, it was urged to have the defendant ordered to anſwer intereſt. Intereſt not being reſerved, Lord *Northington* C. ſaid, he could not order it, but recommended the plaintiff to re-hear the cauſe, merely to introduce a reſervation of intereſt.

10 Nov. 1763.

Jeſſon v. *Brewer.*

Pleadings and a decree are loſt. A paper writing, dated the 26th Oct. 1684, ordered to be entered as the decree, and to be enrolled *nunc pro tunc.*

BY the Minute Book, it appeared a decree was pronounced in this cauſe on the 24th of *October* 1684, which had been drawn up, and acted under, and proceedings had before the Maſter, and reports made.

But the decree had not been entered, and the pleadings in the cauſe were loſt; but there exiſted a paper writing, dated 26th *October* 1684, purporting to be a copy of the decree.

Application was made to enter the ſaid decree, and to inrol it *nunc pro tunc.*

Mr. *De Grey*, Counſel for the petitioner, cited *Snoden* v. *Corbet*, 27 *April* 1742, and Ex parte Earl of *Falmouth*, *May* 1722.

Sir *Thomas Clarke* M. R.—This application is to come at an inſtrument which appears to be a judicial act of the Court: that a decree was pronounced at the time, to the effect of the writing now produced, is evident from the Minute Book at that time: that it

hath been acted under is alſo evident from the report of the Maſter to whom the cauſe was referred, and ſeveral orders ſubſequent to it.

Precedents have been produced in ſupport of the application, and were I to act contrary to precedents I ſhould be guilty of injuſtice.

Suppoſe a deed is loſt; the loſs being proved, a copy of it will be admitted as evidence.

There have been ſimilar applications on account of fire. In *Goddard* and others v. the Earl of *Suffolk* and others, the decree was pronounced the 19th of *James* I.; there was an exemplification under the great ſeal, but damaged ſo as to be ſcarcely legible. The inrolment was not to be found, the records being burnt: application was made to the Court that the decree might be inrolled purſuant to the exemplification. On the 27th *July* 1727, it was ordered that the exemplification ſhould remain in the Rolls Chapel; and on the petition was indorſed, "19 *James* I. Ordered, that the bills, anſwers, decree, &c. when the originals are burnt, on the application of the parties intereſted, ſhall be re-engroſſed from the copies."

And where any decree or inrolment of a decree hath been burnt, on application of a perſon intereſted, on producing any exemplification or writ of execution of a decree, the Court will order the exemplification to be left in the Rolls Chapel, and a new inrolment.

This brings me to conſider the preſent application, and I am of opinion it is the regular way.

In the next place, is there any ground to enter the decree now produced? That ſuch a decree was pronounced, the Minute Book proves; that the decree

Jeffon v. *Brewer.*

hath been profecuted and purſued is evident from the Maſter's report, and ſubſequent orders recogniſing it; but the decree and pleadings are loſt, and there being no other traces of it, than the Minute Book, and what is now produced, which correſpond, I think I am bound by precedent, were it not my own opinion, which it is, that it is right to grant the petition.

And therefore let the paper writing, marked with the letter *A.* purporting to be a copy of a decree that day made in the cauſe wherein *Henry Riſley* gentleman, and *Paul Riſley* an infant by the ſaid *Henry Riſley* his father, and next friend, are plaintiffs; *Thomas Riſley*, &c. defendants, be entered as a copy of that decree, and as ſuch enrolled *nunc pro tunc*; and let the ſaid paper, and the ſeveral orders, reports, and proceedings ſubſequent thereto, mentioned in the petition, remain in the Chapel of the Rolls, with ſuch inrolment.

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3 Dec. 1763.

Odwyer v. *Salvador.*

The Maſter ordered to ſettle what ſecurity the plaintiff, a foreign merchant, was to give to anſwer coſts.

THE plaintiff a merchant, reſident in *Spain*, had dealings with the defendant, and ſetting up a demand, proceeded againſt him in the Courts in this country: and likewiſe brought his bill, and proceeded in this Court.

The defendant the above day applied, ſtating a caſe to the above effect: that he had been put to great expence in the ſuits; that the plaintiff reſided abroad, had no effects here, and was in indifferent circumſtances; and therefore prayed, that all further proceedings

ceedings in this Court might be ſtayed, until the plaintiff gave ſecurity to be approved by the Maſter, to anſwer coſts. *Odwyer* v. *Salvader.*

Lord *Northington* C. on reading an affidavit of the facts, thought the application reaſonable, and granted the motion.

Leithly v. *Taylor.* 20 Feb. 1764.

(Reg. Lib. B. fol. 139.)

ATTACHMENT againſt huſband and wife, for want of the wife's anſwer, ſtayed as to the huſband, and liberty given to attach the wife.

[So in Lloyd v. Barnet, 12th February 1750, and Searl v. Flint, 13 December 1778.]

Ex parte *Munday.* 28 Feb. 1764.

ORDER to acknowledge ſatisfaction, on a Statute Staple. Vid. ſupr. ex parte Ducheſs of *Marlborough.*

Meals v. *Meals.* Hil. 1764. Lord Northington C.

THE plaintiff a feme covert, being entitled to a legacy under the will of her aunt, and the executor refuſing to pay it to the huſband, he inſtituted a ſuit in the Spiritual Court, for the legacy; the plaintiff his wife, filed her bill in this Court, for an injunction

Meals v. *Meals.* to ſtay her huſband from proceeding in the Spiritual Court for the legacy, which was granted, the huſband not having made any ſettlement on, or proviſion for the plaintiff his wife.

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10 July 1764.

Octavius Reynolds and others, Plaintiffs.
Decimus Reynolds and others, Defendants.

(Reg. Lib. B. fol. 337.)

Where money is given in truſt for all the children of their father living at his deceaſe, though the father and mother are ſo aged that their having more children is improbable, the Court will not preſume it to be impoſſible; but in ſuch caſe upon conſent of the father, and of the other children, that their ſhares ſhould remain to anſwer what an after born child might claim, the Court ordered the ſhare of one of them to be paid.

THOMAS *Reynolds*, by his will, dated 5th *April* 1743, gave 4000 *l.* to the defendants *Decimus Reynolds*, and *Edward Lacon*, upon truſt, after the death of his brother, the plaintiff *Octavius Reynolds*, for *all* the children of the ſaid *Octavius*, *living at his deceaſe*, in manner following; viz. for the maintenance and education of ſuch of his nephews and nieces, as ſhould be living at his ſaid brother's death, till twenty-one if males, and till twenty-one or marriage, if females; at which period and not before, he willed the capital ſhould be divided amongſt his ſaid nephews and nieces equally, with benefit of ſurvivorſhip, ſhould any die before. The teſtator died, and on the 28th of *March* 1744, the will was proved.

The bill was to have the truſts of the will executed, and it ſtated, that the plaintiff *Octavius* and his wife, had then *ſeven* children living, one named *Elizabeth*, married to the plaintiff *Penfold*; all of whom had attained twenty-one; that the ſaid *Penfold* and his wife, wanting money, and the plaintiff *Octavius* the father, being willing to give up his life intereſt, as to her ſhare; they applied this day, 10th *July* 1764, to have their

Reynolds et al. v. *Reynolds* et al.

their ſhare of the ſaid truſt money, or ſo much thereof, as the Court thought fit, paid or transferred to them, upon the ground, that the father was ſixty-two, and the wife of the ſame age, and very infirm; and therefore there was no probability of their having more children.

Sir *Thomas Clarke* M. R. ſaid, though it might be improbable, yet it was not impoſſible, and would have denied the motion; but the father conſenting, and the other children conſenting, that their reſpective ſhares ſhould ſtand as a ſecurity, to anſwer what any after-born child, ſhould there be one, might be entitled to, the Court granted the motion.

Atherton v. *Worth*.

2 Aug. 1764.

Bill by ſuch creditors as had ſigned a deed of compoſition, ariſing from a truſt eſtate, conveyed for the purpoſe of paying debts in general; other creditors refuſing to come in, to have the truſts of the deed carried into execution, diſmiſſed.

Henry Worth being greatly indebted by mortgage, bond, and otherwiſe, to divers perſons, by deed of leaſe and releaſe, dated the 4th and 5th *February* 1755, conveyed his eſtates to truſtees, to ſell for payment of his debts, ſhould the creditors come in, and accept the compoſition thereby made.

The plaintiffs and many others, ſigned the deed, and agree to accept the compoſition.

Others refuſed, and in conſequence of ſuch refuſal, the truſtees refuſed to execute their truſt.

The bill is brought to eſtabliſh the ſaid deeds, to have the truſt eſtates ſold, and the money *applied in diſcharge of the creditors coming in under the deed*, ſubject to two mortgages, to the repreſentatives of one

Atherton v. *Worth.*

Crewys; to have an account taken, of what is due to the plaintiffs, and the other creditors, who have acceded to the truſt deed.

It was argued on the part of the plaintiffs, that the intention of the debtor, was juſt and commendable; that he was deſirous of ſatisfying his creditors, as far as his eſtate and effects would extend; that he had with that view, and for that purpoſe, conveyed and aſſigned his eſtates to truſtees; that they the plaintiffs had ſhewn their ready diſpoſition to accede to the terms of the deed, and had executed it, and it was hard, that they ſhould be deprived of this benefit, by the perverſeneſs of creditors, who would not accede to the deed.

Sir *Thomas Clarke* M. R. frequently called upon the plaintiff's counſel, to produce an inſtance of ſuch a ſuit, and proceeded thus:

The defendant *Worth* by the conveyance, meant to do juſtice to all his creditors in general, and not to be partial; and to carry the truſt of the deed into execution, for the benefit of thoſe who have ſigned it, by ſelling the eſtates, and applying the money ariſing from the ſale, as prayed, would be acting contrary to what the deed ſpeaks, and certainly was not intended.

If a debtor convey an eſtate to truſtees for payment of his debts, and to divide the truſt money amongſt the creditors, in proportion to their debts, it is not obligatory on the creditors to come in, and accede to it; neither will it prevent a creditor, who doth not chuſe to come in, from taking a legal courſe, or ſuch as he ſhall be adviſed for payment of his debt. The Court hath no power to prevent him; were I to entertain the ſuit, and direct an execution of the truſts as prayed,

prayed, it would in effect be doing ſo; nay it would be better to do ſo, for after having proceeded at law and obtained judgment, there would be nothing to execute it upon, but the body of the debtor. *Atherton v. Worth.*

The meaning of the conveyance, as I before obſerved, was for the benefit of *all* the creditors, or none.

I have repeatedly deſired a ſingle inſtance to be produced: not one hath been produced, and I am perſuaded cannot; I muſt ſay, that I have not in my reſearches met with one.

I mentioned the manner in which the caſe impreſſed me at the opening. After a week in hearing, I ſee no cauſe to alter my opinion.

Therefore let the bill be diſmiſſed, and I bleſs God, this is not the *dernier reſort*,; there are two things againſt which a Judge ought to guard, precipitancy, and procraſtination.

Sir *Nicholas Bacon* was made to ſay, which I hope never again to hear, that a ſpeedy injuſtice is as good as juſtice, which is ſlow.

Chaffen v. *Wills.*

13 Dec. 1754.

An application by motion, to diſcharge an order for a commiſſion to examine witneſſes on a Maſter's certificate; a queſtion aroſe, whether the mode was by taking exceptions to the certificate, or by motion. Lord *Hardwicke* C. held the preſent to be the proper mode.

Attorney

3 April 1765.

Information at the relation of a lunatic not proper; he muſt be a party.

Attorney General v. *Tiler.*

BILL by the Attorney General, at the relation of a lunatic.

At the hearing an objection was taken by Mr. *Wedderburne*, and Mr. *Madocks*, that the information at the relation of a lunatic was improper: Firſt, becauſe it was not the caſe of an ideot, who is ſo *ex nativitate*, but of a lunatic, who is under a temporary incapacity, and may recover his ſenſes; that though the ſuit was at the relation of the lunatic, yet he was not a party to the ſuit, and ſhould the information be diſmiſſed, who was to pay coſts; that if he ſhould recover his ſenſes, and file a bill for the ſame purpoſes for which this ſuit is commenced, the defendant could not plead this ſuit.

For the defendants it was ſaid, the Attorney General is not a common truſtee, but he ſtands in the place of the Crown, who hath the common care, as *pater patriæ*, of all ideots and lunatics; and the Attorney General, at the relation of a lunatic, againſt Sir *Robert Backhurſt*, 1 *Chancery Caſes* 113, and 153, was cited; and it was alſo ſaid, the Court on application of the defendant, would add a plaintiff to the relator, to anſwer coſts, or have ſecurity given to anſwer them.

Sir *Thomas Sewel* M. R. was clear the objection was well founded, and that it was to be taken as a rule of this Court, from long practice; that a lunatic, or ſome perſon on his behalf, muſt be a party to a ſuit inſtituted for his benefit; and therefore ordered

dered the cauſe to ſtand over, with liberty to amend, by adding parties, and if ſo, adviſed to change the information into a bill. Attorney General v. *Tiler.*

Attorney General v. Lord *Mountmorris.*

June 1765.

LORD *Mountmorris* by his will charged his real eſtate with the payment of his debts and legacies, except three legacies given for charitable purpoſes, which three legacies, he directed to be paid out of his perſonal eſtate.

Lord *Northington* C. decreed the charity legacies to ſtand in the place of the ſpecialty creditors, for what they ſhould exhauſt of the perſonal eſtate.

Bromfield v. *Chicheſter.*

20 June 1765. See Ambl. 464.

IF a defendant is in contempt for want of his anſwer, and he then puts in an anſwer, and that anſwer is reported inſufficient, it is not neceſſary to ſerve the defendant with a ſubpœna to make a better. The plaintiff may immediately go on with the proceſs, where he left off.

So ſaid by Sir *Thomas Sewel* M. R. and confirmed by Lord *Northington* C.

Brunſden

25 June 1765. Ambl. 507. S. C.

Brunſden v. *Woolridge.*

THE teſtator in this cauſe, gave a ſum of 500 *l.* to the poor relations of *Elizabeth Burgeſs.*

Sir *Thomas Sewel* M. R.—The queſtion in the cauſe is, who are poor relations; relations muſt be confined to next of kin, and poor relations muſt be ſuch as want aſſiſtance, and are next of kin according to the ſtatute.

(*a*) 2 Ch. Rep. 146.
(*b*) Ibid. 394.
(*c*) 23 Feb. 1754.

The caſes cited, were *Carr* v. *Bedford* (*a*) *Griffiths* v. *Jones* (*b*), *Iſaac* v. *De Friez* (*c*).

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1 Aug. 1765. Sir Thomas Sewel M. R.

Taylor v. *Leitch.*

JANE *Evans* widow, the plaintiff's late mother, bequeathed to the defendant in truſt for the plaintiff, all her goods, chattels, &c.

They proved the will, and poſſeſſed her perſonal eſtate; upon an affidavit of the above facts, and that upon an account made out between the plaintiff and the defendants, they acknowledged to have in their hands 640 *l.* and that they threatened to go abroad: a writ of *ne exeat regno* was granted, to be marked in 640 *l.*

Weſt

Weſt v. *Welſh.*

29 Nov. 1765. Lord Northington C.

LEGACY payable before twenty-one, ordered to be paid out of the monies in the cauſe, in the name of the Accountant General, before the legatee attained that age.

[Weſton v. Earl of Aylesford, Lord Northington C. Hil. 1766; the like order.]

Hamond v. *Wordſworth.*

13 March 1766.

A COMMISSION iſſued for the examination of witneſſes in *Sweden*; the ſolicitor for one of the parties attended the execution of the commiſſion; in taxing the coſts, the party claimed the coſts of his ſolicitor in attending the execution of the commiſſion. Lord *Northington* C. was decidedly of opinion, he was not entitled to ſuch coſts.

Price v. *Humphrey.*

17 March 1766. Lord Camden C.

DEMURRER to a bill after a decree, under which nothing remained to be carried into execution, but to ſave coſts only. The demurrer was overruled.

Troughton

12 May 1766.

Troughton v. *Getley.*

The defendant had liberty to examine plaintiff as a witneſs. *Qu.*

THE defendant gave notice, and moved for liberty to examine one of the plaintiffs on the cauſe, as a witneſs: it was objected to, as being contrary to rule(*a*); for that if a plaintiff was an immaterial party, the defendant might demur; and if the defendant wanted a diſcovery, he might file his bill for that purpoſe, and in that caſe, the defendant would have an opportunity to tell his caſe and the circumſtances, whereas in his examination before commiſſioners or the examiner, they muſt not permit a witneſs to ſay more, than barely to anſwer the interrogatories. It had been before moved before Sir *Thomas Sewel* Maſter of the Rolls (*b*), and he greatly doubted, and would not grant it; but Lord *Northington* C. laid it down as a rule in law and equity, that a defendant may examine a plaintiff as a witneſs; and therefore as the plaintiff was ſworn to be a material witneſs, it was right to order it; and he accordingly gave the defendant liberty to examine the plaintiff as a witneſs.

(*a*) And ſo I have heard Lord Hardwicke often expreſs himſelf. J. D.

(*b*) Who had a perfect knowledge of the practice of the Court. J. D.

[It was doubted by almoſt the whole Bar, and was exploded by Lord Thurlow C. in Hewtſon v. Tooky, July 6, 1785, infra.]

12 June 1766. Sir Thomas Sewel M. R.

Wride v. *Clarke.*

A teſtator wills his debts to be paid, and charges his eſtates with the payment of them and ſubject thereto, deviſes his eſtate in fee ſimple to his widow; it was held to be equitable aſſets.

DOCTOR *John Clarke*, was indebted to the plaintiff and others, by bond and ſimple contract, and being ſeiſed of a real eſtate, and poſſeſſed of ſome perſonal eſtate; he *willed* all *debts* ſhould be paid, and charged all his eſtates with the payment thereof, and *ſubject*

ſubject thereto, deviſed all his eſtates to defendant *Roſamond* his wife, in fee, and appointed her executrix: ſhe proved the will; poſſeſſed his perſonal eſtate, and entered on his real eſtates.

The bill was brought for ſatisfaction of the debts, out of the teſtator's eſtate.

The defendant the widow, by her anſwer, admitted her late huſband died ſeiſed of ſeveral eſtates, ſubject to mortgages, out of which ſhe was dowable; that he was alſo ſeiſed of copyhold eſtates, to which upon his death, ſhe became entitled according to the cuſtom of the manor; and that he was alſo ſeiſed of freehold eſtates purchaſed after his will, which deſcended to the defendant *Ann Iveſon*, his heir at law; admits her huſband's will, and the charge of his debts on his real eſtate, and that the perſonal eſtate, and the real eſtates deviſed were not ſufficient to pay his debts.

By the decree, an account of the teſtator's debts, and an account of his perſonal eſtate, and application of it in payment of debts, &c. were directed; if that were deficient, the real eſtate deſcended, was to be ſold, and applied in payment of ſpecialty debts; and if there were ſtill a deficiency, an account of the rents and profits of that eſtate was directed, and the ſimple contract creditors, to ſtand in the place of the ſpecialty creditors, and to receive a ſatisfaction *pro tanto*, out of the deſcended eſtate; and if both the above funds were inſufficient, the eſtates of which the teſtator was ſeiſed at the time of his will, were to be ſold, ſubject to the widow's dower, and the money ariſing from the ſale, after payment of the mortgages, to be applied as equitable aſſets, *pari paſſu*, among the creditors remaining unſatisfied; and if any of the creditors

Wride v. *Clarke*.

tors ſhould be paid any thing out of the perſonal eſtate, they were not to receive any more till the other creditors were paid up equal with them.

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17 June 1766.
1 Bro. C. C. 138 in not. S. C.

Silk v. *Prime*.

The teſtator charged all his real eſtates, except a particular eſtate, with the payment of his debts, which he willed ſhould be paid, and *directed* his executors *nominatim*, and the ſurvivor and his heirs, to ſell for that purpoſe, without *deviſing* the eſtate to them: theſe eſtates held to be equitable aſſets, and if deficient, a real eſtate ſpecifically deviſed, and part of the perſonal eſtate, ſpecifically bequeathed, to contribute in proportion to raiſe the deficiency, and the Maſter to ſettle ſuch proportion.

CHRISTOPHER Thompſon was ſeiſed in fee of eſtates in *Yorkſhire*, and poſſeſſed of perſonal eſtate, and by his will, gave his wife an annuity of 60 *l.* during his mother's life, in caſe he died in the life-time of his mother, and charged *all* his eſtates therewith, and gave all his eſtates at *Oatmaſter* to his mother in fee, and gave part of his perſonal eſtate ſpecifically, and directed all his debts to be paid, and if the perſonal eſtate was not ſufficient, *he charged all* his real eſtate, (ſave the ſaid lands at *Oatmaſter*), with the payment of his debts, and did *direct* the defendants *Prime* and *Moxon, and the ſurvivor and his heirs*, to ſell all his eſtates, except as aforeſaid, or ſuch part as with his perſonal eſtate ſhould be ſufficient to pay his debts, and gave the ſurplus of the purchaſe money, and of his perſonal eſtate (if any), to his wife and daughters, equally; and *deviſed* all his eſtates, which ſhould not be ſold, to his wife and daughters in fee, and appointed the ſaid defendants *Prime* and *Moxon* executors.

The teſtator was at his death indebted to the plaintiffs and others; the executors proved the will, and poſſeſſed the perſonal eſtate, and with the widow and daughters, entered on, and received the rents and profits of the real eſtates.

The

Silk v. Prime.

The plaintiffs filed their bill to be ſatisfied out of the eſtates of the teſtator.

The executors inſiſted, that the eſtates directed, not being deviſed, to be ſold, were legal aſſets, and that having been ſureties for the teſtator, they had a right to retain any debt they were liable to pay as ſuch ſureties, and to give a preference to creditors.

The plaintiffs inſiſted theſe eſtates were equitable aſſets.

Upon hearing this cauſe the above day, Sir *Thomas Sewel* M. R. declared, the teſtator's real eſtates charged by his will with the payment of his debts, were equitable aſſets, and decreed an account of the teſtator's debts, and of his perſonal eſtate, and an application of it, in a courſe of adminiſtration: if deficient, the deficiency to be made good out of the real eſtates charged by the will with payment of debts, and the eſtates to be ſold, and the purchaſe money applied in making good the deficiency, if ſuch real eſtates were not ſufficient, the rents and profits of the ſame, to be accounted for in like manner: if all the above funds were deficient, his Honour directed the *deficiency* to be made good out of the *perſonal eſtate, ſpecifically* bequeathed, and the *real eſtate* deviſed to the teſtator's mother in fee, and each to contribute in proportion, and the Maſter to ſettle the proportion; and ſo much of the eſtate deviſed to the mother, as was neceſſary, to be ſold, and the money applied; and if any of the creditors had received any thing out of the perſonal eſtate, they were not to receive any more till the other creditors were paid up equal with them.

Silk v. *Prime.*

On the 8th *March* 1768, this cauſe was heard on an appeal before Lord *Camden* C. preferred by the defendants the executors, inſiſting the real eſtates, charged as aforeſaid, were legal, and not equitable aſſets.

Lord Chancellor.—The teſtator by his will, in caſe his perſonal eſtate ſhould fall ſhort to pay his debts. *directs his executors, and the ſurvivor of them, and his heirs,* to ſell his real eſtate, or ſuch part thereof, as with his perſonal eſtate, ſhould be ſufficient to pay his juſt debts; and the queſtion is, whether the real eſtate ought to be deemed legal, or equitable aſſets?

His Honour the Maſter of the Rolls, hath decreed them equitable aſſets. I am of the ſame opinion, and ſhall affirm the decree.

Where truſtees for payment of debts are made executors, in moſt of the caſes, aſſets are ruled legal.

The firſt caſe in which an eſtate deviſed, to truſtees for payment of debts generally, was deemed equitable aſſets, and the debts to be paid *pari paſſu*, was *Wolley* v. *Long*, 1 *Chancery Caſes*, and 2 *Chancery Caſes* 54, for as the money did not reach the hands of the executors, the creditors could not bring their action, and therefore the ſtatute was made againſt fraudulent deviſes.

In the caſe of Sir *Charles Cox*'s creditors, 3 *P. Wms.* 344, a truſtee was named executor, and the land was charged with debts, and the Court held the aſſets equitable; but where a truſt was repoſed with the executor, difficulties aroſe, as aſſets in his hands as executor, are legal, and ſuch aſſets as are in his hands as truſtee, are equitable. *Co. Litt.* 112 b. 113 a. *Roll. Abr. Tit. Power and Intereſt.*

Where

Where lands were deviſed *to be ſold by executors*, in that caſe, the lands deſcended, and the rents and profits were the property of the heir, till the ſale. But where they were deviſed *to* the executors to be ſold, the profits were taken for the benefit of the executor. Therefore the Courts of Equity gave the heir an entry for breach of the condition; and in all theſe caſes the aſſets were legal. *Girling* v. *Lee*, 1 *Vern.* 63. 2 *Vern.* 133. 249; *Preced. in Chan.* 127. 136; *Bunb.* 339; *Lewin* v. *Okely*, 2 *Atk.* 50. *Silk* v. *Prime.*

A deviſe to a truſtee for payment of debts, and the ſame perſons appointed executors, the aſſets were deemed equitable, and thereby the old rule overthrown; and where the executor hath a naked power to ſell *quâ* executor only, the aſſets are deemed legal.

And the Court ſhould always favour the truſtee, rather than the executor, for the ſake of equality. Here the power is lodged in the executors, and the ſurvivor of them, and his heirs; and this converts the executors into truſtees, and makes the aſſets equitable, which are favoured by the Court.

Therefore let the decree be affirmed (*a*).

(*a*) Bulkley v. Williams, before Lord Thurlow C.—Upon the ſame words as in the two preceding caſes, his Lordſhip, after repeated arguments, and great conſideration, was of opinion, that the word *heirs*, added to executors, plainly meant a truſt, and therefore held the aſſets equitable.

Tonnins v. *Prout.*

18 June 1766. Lord Camden C.

THE defendant, before he had prayed time to anſwer, or was in contempt, was reſtrained from ſelling diamonds, to which the plaintiff by his bill, claimed a title.

17 Dec. 1761. Lord Northington C.

Prentice v. *Prentice.*

Similar allowance in Hyde v. Greenhill, by Lord Hardwicke C.

EXCEPTIONS taken by ſequeſtrators; for that the Maſter had not allowed them 6*s.* 8*d.* a day. They were allowed one ſhilling a day each.

5 & 6 Dec. 1776. See 1 Bl. Rep. 365.

Rebecca Lowe, and *Michael*, *Francis*, and *Benjamin Biddulph*, } Plaintiffs.

William Jolliffe, and *Thomas Samuel Jolliffe*, } Defendants.

An iſſue *deviſavit vel non*, directed to be tried at bar. A verdict by a ſpecial jury in favour of the will. Upon hearing the cauſe on the equity reſerved, the will was decreed to be eſtabliſhed, and the truſts to be executed, and which were executed accordingly. Afterwards the teſtator's heir at law died, having by his will deviſed the reſidue of his real eſtate to one of the defendants his ſecond ſon, he having brought an ejectment; a perpetual injunction was decreed.

THOMAS *Jolliffe* Eſquire, being ſeiſed in fee ſimple of eſtates in the counties of *Worceſter* and *Stafford*, and elſewhere, by his will duly executed and atteſted, deviſed his eſtates in the county of *Worceſter* to his niece, the plaintiff *Rebecca Lowe* for life, with remainder to her firſt and other ſons in tail male; with like remainders to the other plaintiffs; with remainder to the ſons of his eldeſt brother and heir *John Jolliffe*; and deviſed his eſtate in the county of *Stafford*, to *Thomas Mills*, and *Rupert Dovey*, and their heirs in truſt, to ſell in aid of his perſonal eſtate, and to pay the reſidue of the money to ariſe by the ſale, to the plaintiffs *Michael*, *Francis*, and *Benjamin Biddulph*; and gave and deviſed the reſidue of his eſtates, not therein before diſpoſed of, to the ſaid plaintiffs.

By a codicil duly executed and atteſted, he charged the *Staffordſhire* eſtate with other legacies.

On the 1ſt of *April* 1753, the teſtator died, leaving *John Jolliffe* his brother and heir at law.

The plaintiffs filed their bill in this Court to eſtabliſh the will, and to have the truſts executed.

On

Lowe et al. v Folliffe et al.

On the 6th *February* 1762, the cauſe was heard before Lord *Northington* C. and an iſſue *deviſavit vel non*, was ordered to be tried at the bar of the Court of King's Bench, by a ſpecial jury of the county of *Worceſter*.

The trial was had accordingly; and there was a verdict in favour of the will, notwithſtanding the ſubſcribing witneſſes, ſwore to the teſtator's inſanity, whom the Court recommended the plaintiff to indict for perjury, which the plaintiff did in *Trinity Term* 1762. The then defendant *John Folliffe* applied for leave to bring an ejectment to recover the *Staffordſhire* eſtate, or to have an iſſue *deviſavit vel non*, to be tried by a ſpecial jury of that county.

The witneſſes to the will having been convicted of perjury, the cauſe came on to be heard, on the 25th of *April* 1763, before Lord *Northington* C. on the equity reſerved; and his Lordſhip decreed the will to be eſtabliſhed, and the truſts to be executed, and directed the neceſſary accounts, and that the *Staffordſhire* eſtate, or ſo much thereof, as ſhould be neceſſary, ſhould be ſold in aid of his perſonal eſtate, and the ſurplus of the purchaſe money, to be paid to the plaintiffs, *Michael*, *Francis*, and *Benjamin Biddulph*.

The accounts were taken, part of the eſtate was ſold, and the Maſter made his report of the debts, and legacies, which were ſatisfied.

In purſuance of an order, dated the 20th of *April* 1765, the deviſees in truſt, conveyed ſuch part of the *Staffordſhire* eſtate, as had not been ſold, to the ſaid plaintiffs *Michael*, *Francis*, and *Benjamin Biddulph*, and

Lowe et al. v. *Jolliffe* et al.

their heirs, as tenants in common; and the plaintiff *Rebecca Lowe* in conſequence of the decree, continued in quiet poſſeſſion of the *Worceſterſhire* eſtate.

On the 10th *January* 1771, *John Jolliffe* the teſtator's heir at law died, having made a will, whereby he deviſed the reſidue of his real and perſonal eſtate, to his ſaid ſon the defendant, *Thomas Samuel Jolliffe*.

The defendants notwithſtanding the decree, and the acts in conſequence of it, having brought an ejectment againſt two of the tenants of the *Worceſterſhire* eſtate, the plaintiffs filed their bill in this Court for an injunction to ſtay the defendants from proceeding at law for recovery of any part of the eſtates deviſed by the will of the teſtator *Thomas Jolliffe*: the defendants having anſwered, and the cauſe being ſet down for hearing, the defendants preſented a petition, praying leave to file a bill of review, which was ordered to come on at the ſame time with the cauſe.

Upon hearing the petition, the 5th of *December* 1776, the ſame was diſmiſſed.

After which, the cauſe was brought on; Mr. Attorney General, and Mr. *Kenyon* for the plaintiffs; Mr. Solicitor General, Mr. *Ambler*, and Mr. *Holliſt*, for the defendants. And Lord *Bathurſt* C. decreed the injunction granted in this cauſe, for ſtay of the defendants proceedings at law, for and touching any of the matters therein, in queſtion to be perpetual, but did not give coſts on either ſide.

Cockel

Cockel v. *Phipps.*

Dec. 8, 1766.

Legacy on condition of marrying with conſent the condition held to be a condition ſubſequent, and the legacy, payable to the huſband; but the wife being dead, the Maſter to ſee if the huſband had made any proviſion for her.

THE object of the bill, was to be paid the ſum of 500 *l.* with intereſt from the end of two years after the death of *Thomas Phipps*, the teſtator.

The teſtator by his will, dated the 27th of *February* 1746, gave to his daughter, the plaintiff's late wife 1500 *l.* payable within two years after his death, provided ſhe married with the conſent of his executor in writing; if without conſent, then he gave her only 1000 *l.* and the other 500 *l.* to the executor.

The teſtator died, in *February* 1747.

The plaintiff intermarried with the teſtator's daughter; and ſays, though it was not with the expreſs conſent, yet it was with the implied conſent of the executor, and entered into evidence, which was read, to prove the wedding was public, and the company who attended it.

But yet ſuppoſing it was not with the conſent required by the will, he contends the condition is ſubſequent, and that there is no bequeſt over.

The defendant inſiſts on the forfeiture of 500 *l.*

The caſes cited were *Garret* v. *Pritty*, 2 *Vern.* 293; *Meſgrett* v. *Meſgrett*, 2 *Vern.* 580; *Farmer* v. *Compton*, 1 *Chancery Rep.* p. 1.

Sir *Thomas Sewel* M. R. held it to be a condition ſubſequent, and directed the 500 *l.* and intereſt, but before payment, referred it to the Maſter to ſee if the plaintiff had made any *proviſion* for the *iſſue* of his marriage with his late wife; ſhe being dead.

12 Dec. 1766. Ambl. 636. S. C. 1 Bro. C. C. 13 in not. and 33 in not. Lord Camden C.

Widmore v. *Woodroffe.*

(Reg. Lib. B. fol. 54.)

A LEGACY of 200 *l.* to the governors of Queen *Ann*'s bounty, declared to be void, being within the Statute of Mórtmain; the governors being, by their rules, bound to lay out the ſame in the purchaſe of real eſtates.

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18 Dec. 1766. See infr 394 and 395

Chandler v. *Beard.*

BY the decree the eſtates to be ſold, and all proper parties, one of whom was an infant, and thought to be a truſtee within the ſtatute of the 7th of Queen *Ann*, to enable infants to convey; but although Lord *Camden* C. was of opinion the infant was not a truſtee within that act, his Lordſhip nevertheleſs ordered the purchaſer to hold and enjoy until the infant attained the age of twenty-one, and then to apply that he might convey.

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26 Feb. 1767.

Keys v. *Luffkin.*

I give to my two ſiſters A. and B. the reſidue of my perſonal eſtate, held to be a joint tenancy.

THIS bill was brought for an account of the perſonal eſtate of *John Waland* the father, *Joſeph Waland* the ſon, and *John Waland* the ſon.

And the only queſtion in the cauſe aroſe under the will of *Joſeph Waland*, whether the defendant *Mary Luffkin* was entitled to the whole of the reſidue of his perſonal

perſonal eſtate, ſhe inſiſting the bequeſt to her and her ſiſter *Sarah*, the late wife of the plaintiff, was a joint tenancy. The words of the will were, "I give to my ſiſters *Mary* and *Sarah* the reſidue of my perſonal eſtate." *Keys* v. *Luffkin.*

They ſurvived their brother.

Sir *Thomas Sewel* M. R., after directing the neceſſary accounts and payment of debts, &c. declared the reſidue of the perſonal eſtate of the ſaid *Joſeph Waland* belonged to his two ſiſters, *Sarah*, the late wife of the plaintiff, and *Mary*, the wife of the defendant *Luffkin*; and that on the death of *Sarah*, the wife of the plaintiff, the ſame ſurvived to the defendant *Mary Luffkin.*

Douglas v. *Clay.*

21 Feb. 1767.

(Reg. Lib. A. fol. 126.)

Joseph Hankin died in 1764, having made his will, and the plaintiff his executor, who proved the will, and poſſeſſed his teſtator's eſtate: the teſtator being indebted to the defendants and others, they filed an amicable bill on behalf of themſelves and the reſt of the creditors of the teſtator, againſt the plaintiff in this cauſe, his executor, for an account and ſatisfaction out of his aſſets.

After a decree for a ſatisfaction of creditors, the Court will enjoin a ſingle creditor from proceeding at law for his debt.

That cauſe was heard on the third of *July* 1766, and an account of what was due to the plaintiffs and the other creditors of the teſtator was directed, with the uſual advertiſement, and likewiſe an account of the teſtator's eſtate, and an application of it.

The

Douglas v. *Clay.*

The Maſter proceeded under the decree, and adverтiſed for the creditors to come before him. Some of them did, but the plaintiffs in that cauſe, and the defendants in this, omitted ſo to do: and in order to gain a preference to the other creditors, brought an action at law againſt the plaintiff as executor, for payment of their debts; and threatening to proceed to judgment, the plaintiff in this caſe filed his bill for an injunction to ſtay them.

The defendants put in their anſwer, and thereby inſiſted, that their names in the bill ſuggeſted to have been filed by them, was without their conſent; and admittted that they therefore were proceeding at law to recover their debts, and to obtain judgment, and hoped they ſhould not be prevented.

The plaintiff this day, 21ſt *February* 1767, moved for an injunction to ſtay the defendants from proceeding at law againſt him, for and touching any of the matters in queſtion; which, after hearing Counſel on both ſides, Lord *Camden* C. ordered accordingly until further order.

The defendants having filed ſuch bill as before ſtated, for an account of the teſtator's effects, and payment of their debts, and having a decree for that purpoſe, might they not be ſaid to have made their election to proceed in this Court, as was held by Lord *Hardwicke* C. in *Farnham* v. *Burroughs*, 13 *March* 1753?

J. D.

3 March 1767.

Ex parte *Benton.*

The Maſter, upon reference, having certified it to be his opinion, that an infant was not a truſtee within the act of the 7th of Queen *Ann*, entitled, "An act to enable infants truſtees or mortgagees to convey;"

convey:" upon the report being brought before the Court, Lord *Camden* C. was of opinion, that the infant was within that act, and directed him to convey pursuant to it. Ex parte *Benton.*

Buckly v. *Buckeridge.* 14 March 1767.

MOTION on behalf of the plaintiff, an infant, to reſtrain the defendant, the executor, from receiving any more of the perſonal eſtate of the teſtator, and the rents and profits of the real eſtate, and for a receiver.

Lord *Camden* C. would not make any order on the motion, but directed the *prochein amy* to pay the coſts of the application.

Ex parte *Burton.* 31 March 1767. See ſupr. 394. and 392.

THE Maſter being of opinion that an infant was not a mortgagee, or truſtee, within the ſtatute of Queen *Ann*, the queſtion was, in what manner the parties were to proceed; whether by exceptions, or by applying to refer it back to the Maſter to review his report.

Sir *Thomas Sewel* M. R. ſaid, exceptions did not lie to ſuch reports, the reference to the Maſter being to ſtate his opinion: that the proper mode was, to bring it on by a petition ſtating the report, that the Court might judge of it. It was done accordingly; and the Court being of opinion he was an infant within the act, directed him to convey.

Gough

28 July 1767.

Gough v. *Botevel.*

If an heir at law bring a bill to diſpute a will, and the will is eſtabliſhed, he ſhall pay coſts at law and in equity; otherwiſe if he be a defendant.

THIS cauſe came on the above day, on the equity reſerved after a trial at law, on an iſſue *deviſavit vel non*; and a verdict in favour of the will.

The heir at law was plaintiff in the cauſe. The only queſtion was reſpecting coſts. Mr. *Yorke* was Counſel for the plaintiff, Mr. Attorney General *DeGrey*, Counſel for the defendant. It was argued for the plaintiff, that coſts were diſcretionary; that heirs at law were favoured: and though the Court would not give an heir at law his coſts, it would not direct him to pay coſts.

Lord *Camden* C.—Coſts, it is true, are diſcretionary, and the giving or not giving of coſts will depend upon the conduct of the parties. There is a difference where an heir at law files a bill to ſet aſide a will; and where a deviſee files a bill againſt an heir at law in order to eſtabliſh a will; he is brought into Court, and being brought here, he may make the beſt defence he can.

That diſtinction was taken by Lord *Talbot* C. in *Luxton* v. *Stevens*, Trin. 1735, 3 *P. Wms.* 373.; and by Lord *Hardwicke* C. in *Blinkhorne* v. *Feaſt*, 28th *October* 1751, 1 *Wils.* 285; 2 Veſ. 27; by Lord Keeper *Henley* in *Johnſon* v. *Gardner*, 29th *April* 1758 (*a*); and by Sir *Thomas Clarke* M. R. in *Beaumont* v. *Whiton*, *October* 1758: therefore let the bill be diſmiſſed with coſts both at law and in this Court.

(*a*) Supr.

Strode

Strode v. *Wincheſter.*

15 July 1767. Lord Camden C.

Parol evidence of the declarations of a deviſee admitted, to prove her being only a truſtee.

THE teſtator had deviſed *abſolutely* to Mrs. *Gough* his ſiſter, who made her will, and gave her property to the defendant *Wincheſter*, and made him her executor.

Upon hearing this cauſe on a bill by *Strode*, who had married Mrs. *Gough's* daughter, for an account, parol evidence was admitted to prove her declarations, that part of what ſhe poſſeſſed was deviſed to her by *Ferdinando Paris*, though no truſt was expreſſed in his will, for the plaintiff Mrs. *Strode*, her daughter.

Darley v. *Darley.*

21 Nov. 1767. Ambl. 653. S.C.

A recovery after a will, though profeſſedly with a view to confirm it, held by the Judges, upon a caſe ſent to them, a revocation of the will; and perſonal property, directed by the will to go with the real eſtate deviſed, held to be revoked alſo. See Stuart v. Tichborne, cited 2 Veſ. jun. 602.

VINCENT *Darley*, on his marriage with defendant *Elizabeth Darley*, ſettled upon the defendant *Elizabeth Darley* an annuity af 50 *l.* for her life, iſſuing out of certain lands therein mentioned, part of which eſtate was called *Langſtone*.

He afterwards made his will, and thereby deviſed his real eſtates therein mentioned, called *Battens*, to the defendant *Elizabeth Darley*, in manner therein mentioned; and directed his leaſehold eſtate called *Bonds Wall*, which was always uſed and went with *Battens*, to be conveyed to ſuch perſons for whoſe benefit he had deviſed his eſtate called *Battens*. And he deviſed to his widow the rents and profits of his chattel eſtate, in caſe ſhe choſe to reſide at *Battens*; and the uſe of all his houſehold goods, plate, and furniture at *Battens*, and ſtock, quick and dead; and by

Darley v. Darley.

by his ſaid will deviſed to his wife the eſtate called *Langſtone*, part of the eſtate out of which the annuity was to iſſue.

The teſtator, after making his will, by way of ſtrengthening and bettering his title, ſuffered a recovery of *Battens*.

The plaintiff was the heir at law of the teſtator, and the bill was brought to be let into poſſeſſion of the real eſtate of the teſtator, and for an account; inſiſting that the recovery was a revocation of the will.

Upon the cauſe coming on firſt to be heard, a caſe was directed for the opinion of the Judges; whether the recovery was a revocation of the will; and further directions were reſerved.

The Judges certified it was a revocation; and upon their certificate it came on this day for further directions.

Several queſtions were made, but the queſtion originally in the cauſe was ſettled by the Judges' certificate.

The ſecond queſtion aroſe on *Bonds Wall*, a leaſehold eſtate, which, being purchaſed by the teſtator for its contiguity and convenience to *Battens*, and being always held and enjoyed with it, was directed by the will to be conveyed for the benefit of thoſe who held *Battens*.

The plaintiff inſiſted, that as he was now entitled to and held *Battens*, he was alſo entitled to *Bonds Wall*.

On the other hand it was inſiſted it was a leaſehold eſtate, and not affected by the recovery; and that, inaſmuch as the plaintiff the heir had diſputed and prevented

prevented the will from having the intended effect, he was not entitled to any benefit under it.

Another queſtion aroſe as to the effect of the deviſe of the live and dead ſtock at *Battens*, and the uſe of the teſtator's houſehold goods, plate, and furniture at *Battens* to the defendant *Elizabeth*, in caſe ſhe choſe to live there, as, by the recovery and certificate of the Judges, there was an end of that choice.

Lord *Camden* C. declared, the teſtator having ſuffered a recovery after the execution of the will, the ſaid will, as to the deviſes of the real eſtate compriſed in that recovery, was revoked, and that the ſame deſcended to the plaintiff, the teſtator's heir at law.

His Lordſhip alſo declared that the teſtator, having in manner before mentioned revoked *in toto*, the diſpoſition of his freehold eſtate called *Battens*; the direction given by the teſtator to convey his leaſehold eſtate, called *Bonds Wall*, for the benefit of thoſe perſons to whom he had deviſed his ſaid eſtate called *Battens*, is conſequently revoked alſo, and falls into the deviſe of the reſidue of his perſonal eſtate.

And his Lordſhip alſo declared, that the deviſes by the will to the widow of the rents and profits of all his chattel eſtate, in caſe ſhe choſe to reſide at *Battens*, and the uſe of all his houſehold goods, plate, and furniture at *Battens*, ſtock, quick and dead, were become revoked by the revocation of the deviſe of the eſtate at *Battens*, and that the ſame conſequently fell into the reſidue of his perſonal eſtate (*a*).

(*a*) This decree was reverſed as to the laſt points, on appeal to the Houſe of Lords in 1774. See Ambl. 654.

Riggs

28 July 1768.

Riggs v. *Sykes.*

Where a truſt to be executed veſts in an infant, he doth not come within the ſtatute of 7 Ann, to enable infants to convey, but he muſt be decreed to convey on a ſuit for that purpoſe.

John Nicholas conveyed an eſtate to truſtees in in truſt to ſell, and out of the purchaſe money, to pay incumbrances and other debts, and the ſurplus for his own benefit.

The grant contained a power of revocation ſave as to particulars; he afterwards made his will, and appointed his daughter reſiduary deviſee and legatee; ſhe married the plaintiff *Riggs*, and previouſly to the marriage, the eſtate in the grant, after diſcharge of the incumbrances, was ſettled to the uſe of the huſband and wife, and the iſſue of the marriage; and if no iſſue, then for the benefit of the huſband and wife, and the ſurvivor: there being no iſſue, nor probability of iſſue, and the eſtate having been diſencumbered; the plaintiff *Riggs* and his wife, contracted to ſell the eſtate; and the repreſentative of the ſurviving truſtee, being an infant, they in *March* 1760, obtained the uſual order, to refer it to the Maſter, to ſee if the infant, was an infant truſtee or mortgagee within the Statute of the 7th of Queen *Ann*, entitled, "An Act to enable infants, &c. to convey." The Maſter reported he was an infant truſtee; but on the report coming before the Court for confirmation, Lord *Camden* C. was clear he did not come within the Statute, and ſaid, a ſuit muſt be inſtituted, for the purpoſe of having the truſts decreed, which was done, and on hearing the cauſe, the 30th *June* 1760, his Lordſhip decreed the contract to be performed, and the infant to join in the ſale, when he attained the age of twenty-one; and the purchaſer to hold and enjoy in the mean time.

Keeling

Keeling v. *Cartwright.*

27 Feb. 1768.

Commiſſioner's certificate to be confirmed as a report.

THE queſtion was, whether a commiſſioner's certificate was concluſive, or was to be confirmed as a report: it was ſtrongly argued by Mr. *Yorke*, and Mr. *Cox* for the plaintiffs; and Mr. *Wedderburne* and Mr. *Madocks* for the defendants.

Lord *Camden* C. was of opinion, that it ſhould be confirmed; and therefore ordered it to be confirmed, unleſs cauſe ſhewn the firſt ſeal before next term.

Dinely v. *Foot.*

Lord Camden C. 22 April 1768.

Maſter to enquire if a party had attained the age of twenty-one.

THE age of the petitioner being diſputed, it was referred to the Maſter to enquire whether the petitioner was of age, or not: and notice was to be given to Sir *John Dinely*, and others, of attending the Maſter, and they were to be at liberty to conteſt that matter before the Maſter.

Maſon v. *Polier.*

16 May 1768.

The defendant had left the kingdom two years preceding the filing of the bill. Upon an affidavit that the defendant continued abroad, as plaintiff believed, to elude juſtice; the defendant ordered to appear under the 5 Geo. 2.

THE plaintiff and the defendant, had dealings together, and there were accounts between them. Above *two* years before the plaintiff filed his bill, the defendant left the kingdom, and went to, and ſettled in *Spain*, where he then reſided.

The plaintiff having filed his bill againſt the defendant, on the above day, moved upon an affidavit ſtating

Moſon v. *Polier.*

ſtating the above facts, and that he believed the defendant continued to reſide abroad, to elude juſtice; that his Lordſhip would, under the act of 5th of *Geo.* 2. c. 25. "to render proceſs effectual againſt perſons who abſcond to avoid being ſerved," be pleaſed to order the defendant to appear by a given day.

Lord *Camden* C.—The legiſlature in paſſing the act, (as appears from the preamble), meant to relieve a plaintiff, from the hardſhip he had laboured under; who having a juſt demand againſt a defendant that had property in the kingdom, was till that time without remedy, if the defendant could not be found to be ſerved, or abſconded to avoid being ſerved: in order to give a plaintiff that relief, the ſaid act "enacts that if an affidavit ſhould be made, to the *ſatisfaction of the Court*, that there is juſt reaſon to believe, that the defendant is gone out of the realm, or otherwiſe abſconded, to avoid being ſerved with proceſs, (in other words, and which are ſynonimous, to elude juſtice), the Court may make an order, directing the defendant to appear by a certain day, &c."

I muſt own I have ſome doubts on this act of parliament; it is very penal againſt the parties: the grounds are, that the defendant is either gone abroad, or abſconds to avoid being ſerved; the defendant certainly does not abſcond, becauſe he is viſible; it cannot be ſaid he went abroad to avoid being ſerved, for the plaintiff ſtates, the defendant went abroad above two years before the plaintiff thought of filing the bill; and by the act of parliament, the defendant is to have been in the kingdom, within two years preceding

preceding the filing of the bill; but the plaintiff swears, he believes the defendant continues abroad to elude juſtice: the affidavit to be made under the act, is to be to the ſatisfaction of the Court; if it be, the Court may make the order. Upon conſideration of the whole, I think I may order the defendant to appear; and therefore let him appear to the plaintiff's bill, on or before the firſt day of next.

Maſon v. *Poller.*

[But *query* if warranted by the Act? There was a ſimilar order by Sir Lloyd Kenyon M. R. 29th June 1786, moved by Mr. Scott, and founded on the above precedent; but theſe caſes have been ſince exploded. J. D.]

Aubrey v. *Popkin.*

(Reg. Lib. A. fol. 68.)

23d Jan. 1768.

Solicitor's bills of coſts referred to be taxed, after a bond and mortgage executed for payment of the balance alleged to be due on the bills.

The plaintiff's late brother in 1757, employed *Thomas Edwards* of *Cardiff*, as his ſolicitor. In 1763, he delivered a bill to the plaintiff which amounted to 1963 *l.* and gave credit for monies paid him, whereby the ſaid bill was reduced to 1408 *l.* for which *Edwards* required a bond; but the plaintiff declining to give his bond, *Edwards* ſent the plaintiff word, unleſs he would execute a bond for the ſaid balance, payable with intereſt at 4 *per cent.* he would decline proceeding any further in his buſineſs: the plaintiff, therefore, under that apprehenſion, was induced to give his bond.

Within twelve months afterwards, *Edwards* inſiſted on a mortgage of his eſtate, and being in poſſeſſion of the plaintiff's papers, and the plaintiff fearing to be abandoned, executed a mortgage in 1764.

Aubrey v. *Popkin.*

The plaintiff at the time of executing the mortgage never conſulted his friends, as to the juſtice of the bills; and being adviſed they were unconſcionable; that ſeveral charges ought not to have been made at all, and others were unreaſonable; the plaintiff preferred a petition to Lord *Camden* C. praying that the ſaid bill might be referred to a Maſter to be taxed.

The matter of the petition came on this day to be heard.

It was inſiſted on the part of *Edwards*, that the bill having been delivered, and the plaintiff having executed a bond, and mortgage, for the amount of it, it was to be conſidered as an account ſettled, and allowed by him; that it was not now to be opened, and conſequently was not taxable.

On the part of the plaintiff it was ſaid, that although it were true the plaintiff had given a bond, and executed a mortgage for the ſuppoſed amount of the bill; yet that he was impoſed upon, and was induced to do ſo, from an apprehenſion of being deſerted by *Edwards*, who had been concerned for, and knew the affairs of the family; that it was no unuſual thing to pay a ſolicitor's bill, in order to get the papers out of his hands, and then to tax the bill; that this was not more; that the paying of a bill was not a bar to taxation; that the bond and mortgage, were not to be conſidered as a ſecurity for what they appeared to have given, but only for what might eventually appear to be due on them.

His Lordſhip adopted the plaintiff's reaſoning; and ſaid further, that it was a groſs impoſition.

And therefore referred the bills to be taxed; the plaintiff ſubmitting according to the act, to pay what ſhould

ſhould be found due; and his Lordſhip reſtrained *Edwards* from proceeding againſt the plaintiff or his eſtate, upon the bond or mortgage, or otherwiſe, in reſpect of the ſaid bill of coſts, until after the taxation; and reſerved the queſtion concerning intereſt on the bond, and further directions. *Aubrey* v. *Popkin.*

Williams v. Duke of *Bolton.*
Duke of *Bolton* v. *Brewer.*

6, 7, 8, 9, & 12 Dec. 1768.

As to a proviſion by one inſtrument being in ſatisfaction of a proviſion by another.

THE bill in the firſt cauſe was to eſtabliſh the will and codicil of the late *Charles* Duke of *Bolton*; to eſtabliſh the deeds of the 10th of *June* 1765; to have the ſpecific funds transferred to the plaintiff, as ſpecific legacies; to have an inventory of the pictures, plate, &c. in the teſtator's houſes at *Hackwood*, and in *Groſvenor-ſquare*; for an account of timber felled, ſince the death of the teſtator; and for an account of the ore, lying on a part of the teſtator's eſtate, at the time of his death, and to have the ſame conſidered as perſonal eſtate,

The teſtator by his will, gives ſeveral ſpecific and pecuniary legacies to the plaintiff *Brown*; and the wife of the plaintiff *Williams*; and limits his eſtate in remainder to the plaintiff *Joan Mary Paulet*.

By a deed dated 10th *June* 1765, he diſpoſes of his leaſehold eſtate in *Groſvenor-ſquare*, and his plate, furniture, and pictures, &c. therein deviſed, to truſtees for ninety-nine years; firſt for Mrs. *Brown* in caſe ſhe ſo long live, and then he gives them over.

Williams v. Duke of *Bolton*. Duke of *Bolton* v. *Brewer*.

By a ſecond deed, dated the ſame 10th day of *June*, the teſtator demiſes his eſtate in *Yorkſhire* to truſtees, for two thouſand years, to pay to the plaintiff Mrs. *Brown* 800 *l.* a-year during her life, and the ſum of 5000 *l.* and 600 *l.* a year to Miſs *Paulet* till ſhe attains twenty-one, and then 12,000 *l.*

By a third deed dated the ſame day, he grants 300 *l.* a year to Mrs. *Thornhill*.

The croſs bill was to have an iſſue, to try the will as to the real eſtate but ſo as not to impeach the bequeſts as to the perſonal eſtate; and to ſet aſide the ſaid deeds, for fraud, impoſition, and undue influence.

One queſtion in the cauſes was, whether the proviſions by the deeds, were in addition to the proviſions in the will; or were to be conſidered, in part ſatisfaction of them.

The caſes cited were, *Emmery* v. *Gould*, 2 *Chancery Reports*; *Lanoy* v. *Lanoy*, *Select Caſes* in the time of Lord *King*, p. 48(*a*); *Hale* v. *Acton*, 2 *Chan. Reports* 85; *Jeſſon* v. *Jeſſon*, 2 *Vern.* 255; *Thomas* v. *Keymis*, 2 *Vern.* 348; *Bruen* v. *Bruen*, 2 *Vern.* 439; *Copley* v. *Copley*, 1 *P. Wms.* 147; *Hartop* v. *Whitmore*, 1 *P. Wms.* 681; Mayor of *London* v. *Ruſſel*, *Finch's Reports*, 290 & 681; Lord *Pawlet* v. Lady *Pawlet*, 2 *Chan. Reports* 286; *Jobſon* v. *Scudamore*, *Reports* in time of Lord *King*, 63; *Brudenell* v. Lord *Boughton*, 2 *Atk.* 268.

(*a*) 2 Eq. Ca. Abr. 773. S. C.

Lord *Camden* C.—There are ſeveral queſtions in theſe cauſes; the firſt relates to fraud, impoſition, and undue influence, as to which there is no proof; therefore let the croſs bill, ſo far as it ſeeks to ſet aſide the three deeds on the ground of fraud, and impoſition, ſtand diſmiſſed.

The

The ſecond queſtion, ariſes on the will, and deeds; whether the plaintiffs in the firſt cauſe, are entitled to the proviſions under the will, and deeds; and if only under one, under which; and as to that point, I am clear the plaintiffs are entitled only under one; and that is under the deeds, and not under the will.

As to double portions, the law is clear and ſettled, that the latter proviſion, is a ſatisfaction of the former.

Where a ſum is given to a child being a debt by nature from a parent to a child, it is then a portion, the father being a debtor; but where it is given by a collateral relation, it is not ſo.

Shudall v. *Jekyll* (*a*), is a caſe in point; the caſes ſtated related to portions.

(*a*) 2 Atk. 516.

Did it ever come in queſtion on a wife's double portion?

Whether there is any caſe or not, I ſhould certainly carry it to the one, as well as to the other.

Where a proviſion is made for a wife by one deed, and a portion or proviſion is made by another, and it is not expreſſed to be in addition to the firſt, it certainly will carry a preſumption, that the latter was intended in ſatisfaction to the wife of the former.

And I am of opinion, that the proviſion for the plaintiffs by the deeds, was intended in lieu of the proviſions made by the will; and that the plaintiffs muſt be bound by the diſpoſition under the deeds, and that the proviſion thereby made for them, is to be deemed a ſatisfaction for what is given to them by the will; but as to the limitations over of the real eſtates by the will, I am clear they are not excluded by the deeds.

22 April 1769.

Gibſon v. *Egerton.*
Bumſted v. *Stiles.*

Bond creditors not to have intereſt beyond the penalties of their bonds. Vid. ſupr.

THESE cauſes came before Lord *Camden* C. on two ſets of exceptions, to the report of *Peter Holford* Eſquire, one of the Maſters of the Court: the firſt by *William Bumſted* plaintiff in the ſecond cauſe; the other ſet by *Nathaniel Ireſon* a creditor, who had come before the Maſter under the decree.

The plaintiff *Bumſted*'s were firſt, for that the Maſter had allowed him, only the ſum of 1230*l.* 19*s.* as his proportion of the principal and intereſt, on a bond mentioned in the fourth ſchedule, to bear date the 9th of *April* 1724; and on which judgment had been entered up in *Eaſter* Term 1740, the ſaid Maſter having allowed only the penalty of the ſaid bond, whereas the Maſter ought to have allowed the ſum of 1900*l.* 1*s.* 11*d.* being the ſaid *Bumſted*'s proportion of the principal and intereſt, computed to the 20th of *November* then next; Secondly, for that the Maſter had allowed the penalties of three bonds entered into by the teſtator, to *Thomas Bumſted* deceaſed, in the ſeveral penalties of 400*l.* 400*l.* and 480*l.* condition, for the payment of 200*l.* 200*l.* and 240*l.*; whereas the Maſter ought to have allowed the ſaid ſeveral principal ſums of 200*l.* 200*l.* and 240*l.* with intereſt for the ſame, after the rate of 4 *per cent.* from the dates of the ſaid bonds, to the 20th of *November* 1768.

The exceptions of *Ireſon* were firſt, for that the Maſter had not allowed him intereſt on the ſum of 1344*l.* for which he had obtained a judgment in

Michaelmas

Michaelmas Term 1741, in an action of covenant broken againſt Sir *Francis Hoſkins Stiles* as adminiſtrator, with the will annexed of the teſtator *Benjamin Hoſkins*; whereas the Maſter ought to have allowed him the ſaid *Ireſon*, lawful intereſt on the ſaid ſum of 1344 *l.* from the 18th of *December* 1741, when the final judgment was ſigned. *Gibſon* v. *Egerton*. *Bumſted* v. *Stiles*.

Secondly, for that the Maſter had not allowed him the ſaid *Ireſon*, intereſt on the ſum of 58 *l.* 4 *s.* 4 *d.* for which he had obtained a judgment of *Michaelmas* Term 1741, in an action of treſpaſs on the caſe upon promiſes; whereas the Maſter ought to have allowed lawful intereſt on the ſaid 58 *l.* 4 *s.* 4 *d.* from the 18th *December* 1741, when final judgment was entered up.

Theſe exceptions were arguing on the 7th, 8th, 15th, and 22d *April*, 1769; the Attorney General, the Solicitor General, and Mr. *Graham*, were Counſel for the exceptants; Mr. *Wedderburne*, Mr. *Ambler*, Mr. *Madocks*, and Mr. *Perryn*, for the other parties.

Lord *Camden* C. overruled all the exceptions, and was ſo clear, that he wiſhed he had been warranted in making the exceptants pay coſts: his Lordſhip relied much on the caſe of *Bromley* v. *Gooder*, 4th *November* 1743, in 1ſt *Atk.* 75. where Lord *Hardwicke* C. in directing the Maſter to compute intereſt on the bonds, notes, &c. of Sir *Stephen Evance*, carrying intereſt, adds, *but on the bonds no intereſt, beyond the penalties thereof.*

Thorold

12 April 1769.

Thorold v. *Charlotte Hay.*

The defendant bribed a man, whom ſhe ſcarcely knew, to marry her for the purpoſe of ſcreening her againſt creditors. The Court conſidered her as a feme ſole, and required her to anſwer a bill brought by one of her creditors, for a diſcovery, and payment of his debt.

THE defendant being indebted to the plaintiff, and others, with a view to cover herſelf againſt creditors, agreed to give a man (ſaid to be an *Iriſh* chairman), a ſum of money to marry her; he accepted the propoſal: they were married at a church in the city; they parted at the church door, and had no further intercourſe.

The plaintiff filed his bill againſt her, to be paid and ſatisfied the demand he had on her, as an unmarried woman, and for a diſcovery: Being ſerved with a ſubpœna, and not appearing, an attachment iſſued againſt her, and ſhe was taken upon it.

On the 12th of *April* 1769, ſhe applied to be diſcharged out of cuſtody, with coſts; and that the attachment might be vacated, inſiſting ſhe was a married woman; that the plaintiff was informed of it, and therefore the attachment iſſued irregularly; and her counſel alleged, that had ſhe appeared, it would have been too late to have objected to the propriety of the bill, and cited two caſes, *Travers* v. *Buckley*, 8th *February* 1749(*a*), and *Jerningham* v. *Glaſs*, *Hilary Term* 1746-7 (*b*).

(*a*) 1 Wils. 264. 1 Veſ. 283.
(*b*) 3 Atk. 409.

Lord *Camden* C. (Sir *Thomas Sewel* the Maſter of the Rolls being alſo preſent, and conſulted).—The principal matter in this bill is to diſcover whether the defendant is married, or not. His Lordſhip then ſtated in what manner the marriage was effected: from the time of the marriage, ſhe doth not mention one word of co-habitation: it is evident from her own account, the marriage was had with a man, whoſe name

ſhe

ſhe hardly knows, merely with a view to cover her againſt creditors; if the objection were to be allowed upon the ſingle affidavit of the woman, every ſuit againſt a woman for diſcovery would be prevented: to vacate the attachment, would be a denial of juſtice: if ſhe deny the plaintiff's allegations by anſwer, the plaintiff hath an opportunity of examining witneſſes to falſify it. *Thorold* v. *Hoy.*

The conſequence will be, ſhould I vacate the attachment, the plaintiff and every other creditor will be barred at law: I think the ſuit proper; therefore I will make no order for vacating the attachment.

Lamplugh v. *Lamplugh.*
John Foſter Lamplugh v. *Cox.*
Cox v. *John Foſter Lamplugh.*

5, 6, 27, & 30 May 1769.

Securities ſet aſide being unconſcionable and oppreſſive, and obtained by taking advantage of the party's poverty, and diſtreſs.

THE queſtion in this cauſe aroſe on the ſecond, and third ſuits.

The bill, in the ſecond cauſe, was by *John Foſter Lamplugh*, to have an account taken of all ſums of money, really and *bonâ fide* advanced by the defendant *James Cox* to the plaintiff, and that upon payment of what ſhould be found due with intereſt, from the time of advancing the ſame, all judgments, bonds, and other ſecurities, which the defendant *Cox* had obtained from the plaintiff, might be delivered up, and be declared to have been obtained by fraud, impoſition, and miſrepreſentation; and that the defendant *Cox* might reconvey the eſtate free from incumbrances; and the plaintiff ſtated the following caſe:

That

Lamplugh et al. v. *Cox* et al.

That in the year 1742, he wrote in the office of *John Rayner* an attorney at law, for 12 *s.* a week, at which time the defendant *Cox*, was an articled clerk to the ſaid *Rayner*, and knew that the plaintiff was entitled to a conſiderable eſtate on the death of his mother.

That the plaintiff afterwards marrying, went into *Yorkſhire*, and continued there till 1754, when having two children to maintain, and having no more than 50*l.* a year, which was allowed him by his mother, and being in debt, he came to town, and applied to his old acquaintance the defendant *Cox*.

That *Cox* knowing his diſtreſſed circumſtances, and the eſtate he was entitled to on the death of his mother, who from her age was not likely to live more than three or four years, propoſed granting to the plaintiff an annuity of 100*l.* upon his giving a bond for 1550*l*, with intereſt at 5 *per cent.* and to allow him *Cox* 5 *per cent.* for inſurance; and *Cox* was to execute a bond to pay the ſaid annuity.

That the plaintiff being greatly diſtreſſed in his circumſtances, and fearing to be arreſted, and relying on the integrity of *Cox*, was prevailed on to execute a bond, dated 21ſt *December* 1754, for payment of 1550*l.* and intereſt out of the ſaid eſtate; and another bond for payment of the ſum demanded from the plaintiff for inſurance, with a warrant of attorney to confeſs judgment, which *Cox* entered up: that *Cox* alſo prevailed on the plaintiff to execute a mortgage of his eſtate, and that *Cox* at the ſame time entered into a bond, to ſecure the annuity of 100*l.* to be paid quarterly, which was all the ſecurity the plaintiff

plaintiff had for payment of the annuity, *Cox* having no eſtate.

That the plaintiff being entirely under the influence of *Cox*, *Cox* on the 1ſt day of *January* 1756, drew out an account, in which he made the plaintiff debtor to him in 1550 *l.* the principal ſum, 79 *l.* 12 *s.* 4 *d.* for intereſt, 79 *l.* 12 *s.* 4 *d.* inſurance, with other ſums, ſaid to have been advanced to the plaintiff, making in the whole 2077 *l.* 7 *s.* 9 *d.* which accounts *Cox* prevailed on the plaintiff to ſign, and to give him a new bond for that ſum, with a warrant of attorney to confeſs judgment; and alſo another bond, taking notice, that the plaintiff was only tenant for life, expectant on the death of his mother, to allow *Cox* 5 *per cent.* for inſurance, and alſo to execute a mortgage for the ſame.

That in this manner *Cox* proceeded yearly, until the demand as claimed by him, amounted to 7000 *l.* to be relieved againſt which, the plaintiff filed his bill.

The defendant *Cox* by his anſwer, inſiſted on the juſtneſs of his demand; that it was free from fraud, impoſition, and undue influence; and particularly inſiſted, that although he paid no money for inſurance, yet as he ran the riſque, he ought to be conſidered as the inſurer, and to have an allowance for it.

And by his bill, prays to have the ſaid *John Foſter Lamplugh*'s eſtate, and intereſt ſold, and thereout to be paid what is due to him on his ſecurity.

On hearing theſe cauſes, Lord *Camden* C. was clearly of opinion, that *Cox* not having paid any money for inſurance, was not entitled to an allowance for inſurance; and declared that the contract for the purchaſe

Langleigh et al. v. *Cox* et al.

of the annuity of 100 *l.* for the life of the plaintiff, ought to be ſet aſide, as *unconſcionable and oppreſſive*, and obtained by *Cox*, by taking advantage of the poverty and diſtreſſed circumſtances of the plaintiff; and ordered all the deeds and ſecurities, except the mortgage of the 1ſt of *January* 1756, and the two judgments, to be delivered up to be cancelled; and the ſaid mortgage and two judgments to ſtand as a ſecurity for what ſhould be found juſtly due from the plaintiff to *Cox*.

The Maſter to take an account of all ſums really advanced and lent by *Cox* to the plaintiff, and to compute intereſt from the time of advancing the ſame at 5 *per cent*.

And upon payment of what ſhould be found to be due, *Cox* to reconvey.

The plaintiff, to pay the other defendants their coſts; *Cox* to repay the plaintiff thoſe coſts; alſo to pay the plaintiff his coſts; and *Cox*'s bill diſmiſſed with coſts.

Attorney General v. *Downing*.

17 June and 3 July 1769. Ambl. 550, and 571. S. C.

Deviſe in mortmain by a will made before the Stat. 9 Geo. 2. is good; and it being of lands to build, and endow a college, held it might be carried into execution, on a grant of a charter from the Crown.

SIR *Jacob Gerrard Downing*, was ſeiſed and poſſeſſed of freehold eſtates, of leaſehold eſtates for terms of years, and of copyhold eſtates, not ſurrendered to the uſe of his will, and of eſtates purchaſed after the will.

He made his will dated the 20th day of *December* 1717, and thereby deviſed all his manors, lands, tenements, and hereditaments, whereof he was ſeiſed of any eſtate of inheritance or freehold, to the Earl of *Carliſle*, Lord *Letchmere*, *John Pedley*, and *Robert Pulyn*,

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Pulyn, to the uſe of his couſin Sir *Jacob Garrett Downing* for life; with remainder to his firſt and other ſons in tail male; with remainder to *Thomas Barnardiſton*, and his heirs male, in the ſame ſtrict manner; with remainder to the ſaid truſtees, and their heirs in truſt to purchaſe with the rents and profits, the inheritance of ſome piece of ground in *Cambridge* proper for the erecting of a college, and to build all ſuch houſes, erections, and buildings, as ſhould be fit for that purpoſe; which college ſhould be called *Downing College*; and to obtain a royal charter for the founding of ſuch college, and incorporating a body collegiate, by that name in the Univerſity of *Cambridge*, which ſhould conſiſt of ſuch head, or governor or governors, and of ſuch fellows, ſcholars, members, and other perſons for the time being; and ſhould be maintained, governed, and ordered, by ſuch laws, rules, and orders, and in ſuch manner, and ſhould be profeſſed and taught ſuch uſeful learning, as his ſaid truſtees and their heirs, with the conſent of the Archbiſhops of *Canterbury* and *York*, and the Maſters of *St. John* and *Clare Hall*, in the Univerſity of *Cambridge*, in being at the founding the ſame college, ſhould direct and appoint; and from and after the founding and incorporating ſuch college, or body corporate, the ſaid truſtees and their heirs, ſhould ſtand, and be ſeiſed of all and ſingular his manors, &c. in truſt for the ſaid collegiate body, and their ſucceſſors for ever: and he gave his leaſeholds upon the ſame truſts.

In 1722, the truſtees conveyed back to Sir *George* all his eſtates.

Sir

Attorney General v. Downing.

Sir *George* died on the 10th *June*, 1749, leaving Sir *Jacob* his heir at law.

Sir *Jacob* and all the remainder-men being dead withoue iſſue, an information was filed, to have the will of Sir *George* eſtabliſhed, and the truſts performed; and was brought againſt Lady *Downing*, who was the widow of Sir *Jacob*, and deviſee of all his eſtates; and againſt the heirs at law of Sir *George*, and of Sir *Jacob*.

Several queſtions aroſe in the cauſe, the firſt and principal queſtion was, whether the deviſe of eſtates in mortmain to eſtabliſh a college, was illegal, and void.

Upon this queſtion, Lord *Northington* C. called to his aſſiſtance Sir *Thomas Sewel* M. R. and Lord *Camden*, the Chief Juſtice of the Common Pleas.

This queſtion was branched into three points.

Perſonal eſtate liable to legacies, before the real: leaſes renewed after making the will, do not paſs under it.

Firſt.—Whether the truſt was illegal, and void.

Secondly.—If not illegal, and void, Whether it was not contrary to the policy of the realm, and of ſuch a nature and under ſuch circumſtances, that this Court ought not to aſſiſt it.

Copyhold not ſurrendered to the uſe of the will, deſcends to the heir.

Thirdly.—If it were illegal and void, and of ſuch a nature, as that this Court would not aſſiſt the truſt, whether this Court will not apply it to ſome other charity *ejuſdem generis*.

Republication by a codicil when, and when not.

It was held not to be affected by the Statute of the 9th of *Geo.* 2. having been paſſed ſubſequently to the making of the will; and that it was a truſt that might be carried into execution, if his Majeſty would be pleaſed to grant his charter for that purpoſe.

And

And as to the perſons who ſhould apply to the Crown and ſhould have the regulation of the charity, it was held that the heirs at law of the teſtator were the proper perſons. Attorney General v. *Downing*.

The other queſtions in the cauſe, ſtood for judgment till this day (*a*).

(*a*) 3 July 1769.

Lord *Camden* C.—The principal queſtion being determined, the remaining queſtions are,

Firſt.—Whether the annuity to Mrs. *Bagnell* is charged on the real eſtate only.

Secondly.—Whether the leaſehold eſtates, renewed after the will, and before the teſtator's death, paſſed by the will.

Thirdly.—Whether the copyhold eſtate not ſurrendered, paſſed by the will.

Fourthly.—Whether the codicil is a republication of the will; ſo as to paſs eſtates purchaſed after the will.

As to the firſt queſtion, whether the annuity is charged on the real eſtate, in exemption of the perſonal eſtate; nothing but the apparent intention of a teſtator will exempt his perſonal eſtate.

An annuity I conſider as a legacy; the perſonal eſtate is the natural fund for anſwering it, and nothing can exempt the perſonal eſtate, but expreſs words or implication.

There are no words in the codicil that will bear that conſtruction; this annuity is only a charge on the real eſtate, in caſe the perſonal eſtate be not ſufficient; and therefore the perſonal eſtate muſt be firſt applied.

The ſecond queſtion is, as to the leaſehold eſtates, whether they paſs by the will; this is ſettled in the

Attorney General v. *Downing.*

(a) 2 Atk. 593.

caſe of *Abney* v. *Miller*, in *Atkins* (*a*), by Lord *Hardwicke* C. which I adopt; therefore theſe leaſes muſt go to the reſiduary legatee.

The third queſtion reſpects the copyhold deviſed to the charity; but which the teſtator did not ſurrender to the uſe of his will; whether the Court will ſupply the defect of the ſurrender, for the benefit of the charity; I am of opinion it will not, and that it muſt deſcend.

The laſt queſtion reſpects the republication of the will by the codicil, ſo as to paſs the after-purchaſed eſtate; and as to this point, the caſe of *Litton* v. Lady *Falkland* (*b*); and Lady *Lanſdown*'s caſe, *Rep. Eq.* 115; 10 *Mod.* 96, are applicable; and I am of opinion, the will is not republiſhed by the codicil; becauſe there is nothing in the contents of the codicil, that indicate an intention of the teſtator to republiſh it. *Beckford* v. *Pannin*, 1ſt *Rolls Abr.*; *Alford* v. *Alford*, 2 *Vern.* 209, and 3 *P. Wms.* 168; Attorney General v. *Barnes*, 2 *Vern.* 597, and 3 *Chan. Caſes*, 81. 150; Lord *Lanſdowne's* Caſe, 3 *Chan. Rep.* 179; *Steed* v. *Berrier*, 2 *Jones*, 135 (*c*); *Acherly* v. *Vernon*, *P. Wms.* 783.

(b) 1 Bro. P. C. 229.

(c) 1 Freem. 472.

A codicil *quà* a codicil, doth not act as a republication of a will, unleſs it contain expreſs words, or words of implication, that the teſtator meant it as ſuch.

The codicil on which the queſtion ariſes, doth not ſpeak an intention in the teſtator to republiſh the will, nor is ſo mixt with the will, as to make it conſequential.

As to the queſtion, who hath the right to conduct the charity, I am of opinion, the heirs at law have the beſt right to have the conduct of it.

Declare

Declare the will and codicil well proved; and that the truſts ought to be carried into execution, in caſe the King ſhall be pleaſed to grant his charter to incorporate the college, and his royal licence for ſuch incorporated college to take the deviſed premiſes in mortmain; and let the heirs at law be at liberty to apply to the Crown for that purpoſe. Attorney General v. *Downing*.

And declare the freehold premiſes purchaſed after making the will, did not paſs by virtue of the codicil, the will not being thereby republiſhed.

And declare that the leaſes which were renewed, or were run out, after making the will, and before the teſtator's death, did not paſs by the will, but fell into the reſidue of the teſtator's perſonal eſtate.

And declare, that the copyhold eſtate, not ſurrendered to the uſe of the teſtator's will, deſcended to the teſtator's heir at law, living at the time of his death.

And it being ſuggeſted, that there were ſeveral buildings on part of the deviſed premiſes, ſo conſtructed, as to be made moveable from place to place, it was referred to the Maſter, to enquire what was the nature of ſuch buildings, and to report his opinion, and all circumſtances to the Court.

Duſour v. *Pereira*.

18 July 1769.

A mutual will by the huſband and wife if revoked, muſt be revoked jointly; or if revoked ſeparately, notice muſt be given to the other party of ſuch revocation.

THIS cauſe ſtood this day for judgment.

The caſe on which the principal queſtion aroſe, ſtood thus: Mrs. *Camilla Rancer*, the wife of *Rancer*, being entitled to a legacy under the will

Dufour v. Pereira.

will of her aunt: ſhe and her huſband agree to make a mutual will, which they do, and both execute it.

The huſband died; the wife proved his will, and afterwards made another will. And the queſtion was, whether it was in the power of the wife, to revoke the mutual will.

Lord *Camden* C.—This queſtion ariſes on a mutual will of the huſband and wife; the will is jointly executed by them.

What the wife diſpoſes of, is the reſidue of her aunt's eſtate, given to her by her will.

I do not find the caſes go ſo far, as to conſider a legacy to a wife, as excluding the huſband by implication; but there is no occaſion to determine that queſtion.

The queſtion is, as the huſband by the mutual will aſſents to his wife's right, and makes it ſeparate, whether the ſecond will by the wife is to be conſidered as void.

It ſtruck me, at firſt, more from the novelty of the thing than it's difficulty.

The caſe muſt be decided by the laws of this country. The will was made here; the parties lived here; and the funds are here.

Conſider how far the mutual will is binding, and whether the accepting of the legacies under it by the ſurvivor, is not a confirmation of it.

I am of opinion it is.

It might have been revoked by both jointly; it might have been revoked ſeparately, provided the party intending it, had given notice to the other of ſuch revocation.

But

But I cannot be of opinion, that either of them, could, during their joint lives, do it ſecretly; or that after the death of either, it could be done by the ſurvivor by another will.

It is a contract between the parties, which cannot be reſcinded, but by the conſent of both. The firſt that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.

The defendant *Camilla Rancer* hath taken the benefit of the bequeſt in her favour by the mutual will; and hath proved it as ſuch; ſhe hath thereby certainly confirmed it; and therefore I am of opinion, the laſt will of the wife, ſo far as it breaks in upon the mutual will, is void.

And declare, that Mrs. *Camilla Rancer* having proved the mutual will, after her huſband's death; and having poſſeſſed all his perſonal eſtate, and enjoyed the intereſt thereof during her life, hath by thoſe acts bound her aſſets to make good all her bequeſts in the ſaid mutual will; and therefore let the neceſſary accounts be taken.

15 Nov. 1769. Ambl. 566. S.C.

Attorney General, at the relation of the Maſter and Scholars of *Pembroke Hall, Cambridge*, - } Informant.

AND

Sarah Parkin, David Sharpe, Grace his wife, and *Charles Adamſon*, - } Defendants.

(Reg. Lib. A. fol. 111.)

A copyhold eſtate deviſed to Pembroke Hall, Cambridge, not having been ſurrendered to the uſe of the will, the defect decreed to be ſupplied by the heir at law, to whom the teſtator had deviſed freehold eſtates, Mortgages and other ſecurities being alſo deviſed to the ſaid College, ſome of which had been called in by the teſtator, and others paid voluntarily, and laid out by the teſtator; the money ſo called in and paid, declared to belong to the College, with intereſt from one year from the teſtator's death, at 4 per cent. See Ford v. Fleming, 3 P. Wms. 469.

THE Reverend *Richard Parkin* having been educated at the ſaid College, and having no iſſue, on the 17th of *June* 1759, made his will, of his own writing (which was duly executed), as follows: "I give and bequeath to my ſiſter *Sarah Parkin*, my houſe and freehold lands in *Buton Bendinch*, in *Norfolk*, for life; and after to the Maſter, Fellows, and Scholars of *Pembroke Hall, Cambridge*: Alſo, I give to her my copyhold lands in *Weſt Durham*, for her life only (which he had not ſurrendered to the uſe of his will); and on condition ſhe ſettle the ſame after my death on the aforeſaid Hall, and give ſuch ſecurity in a month after my death ſo to do, as the ſaid Society ſhall ſee proper; otherwiſe, I give the ſame to the ſaid Maſter, Fellows, and Scholars above mentioned at my death."

And taking notice, there were due to him, upon *mortgages, bonds, and notes*, ſeveral ſums of money, which he *particularly ſpecified, and the perſons from whom due*, he proceeds thus: "And out of the intereſt to ariſe *from thoſe* mortgages, bonds, and notes, I give to my ſiſter *Sarah* 60 *l. per annum*, upon condition ſhe doth not marry; but if ſhe doth, or acts in any manner to controvert my will, or make any further claim

or

or demand, then I revoke all that is hereby given to her." And then, out of the intereſt of the ſame funds, he gives 16 *l. per annum* to his ſiſter *Grace* for her life, upon condition ſhe doth not controvert the will, or make any further claim; if ſhe doth, all given to her by the will to be void. "And after the death of my ſaid ſiſters, my will is, that *all the mortgages, bonds, and notes aforeſaid*, be veſted in the Maſter, Fellows, and Scholars of *Pembroke Hall*; and I do hereby give and grant them to the ſaid Maſter, Fellows, and Scholars aforeſaid, together with what ſhall remain yearly out of the annual intereſt of the ſaid mortgages, bonds, and notes, after payment of the ſaid 60 *l.* a-year and 16 *l.* a-year to my ſaid ſiſters; and as either of them ſhall die, the legacy that was paid yearly to them ſhall ceaſe, and be veſted immediately in the ſaid Maſter, Fellows, and Scholars in truſt as aforeſaid."

The will then goes on to point the particular uſes for which he had made the ſaid deviſe, and bequeſt to the relators.

And taking notice, that a conſiderable *ſum of money* was due to him for intereſt on three of the above mortgages (which the teſtator names), he goes on: "My deſire is, the ſame be paid my ſiſter *Sarah* and *John Adamſon* (whom he appoints executors), as ſoon as poſſible; and with the money ariſing from my goods and chattels, which I hereby order to be ſold (except ſome particulars, which he ſpecifically bequeaths to his ſaid ſiſter *Sarah*), to be put out on good ſecurity, and the yearly intereſt to be paid to his ſaid ſiſter *Sarah* during her life, and after her death the whole property to be paid to the relators, in truſt for the uſes

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before mentioned; and appoints his ſiſter and *John Adamſon*, two of the defendants, executors."

On the 27th of *Auguſt* 1765 the teſtator died, without iſſue, leaving the ſaid *Sarah Parkin* and *Grace Sharpe* his ſiſters, his co-heireſſes at law, and next of kin.

The executors proved the will and poſſeſſed the teſtator's eſtate, and paid the debts and legacies, except what was given to the relators; and having refuſed to account with the relators, the relators filed their information to eſtabliſh the charity, and for an account of the teſtator's eſtate.

The defendants, as a ground for their refuſal to account, inſiſted that there had been great variations, alterations, and addition to the teſtator's perſonal eſtate, after making his will; the ſame at his death conſiſting principally of money due to him on mortgages and other ſecurities made to him; and that many of ſuch were made, and the money lent after making his will; and that the relators were entitled *only* to ſuch mortgages and ſecurities, or the benefit thereof, as were particularly deſcribed in the will, and were ſubſiſting and unſatisfied at his death; and not to any part of the money due on the mortgages or ſecurities made to him after the making of his ſaid will; but that the reſidue of the teſtator's eſtate was to be conſidered as undiſpoſed, and that they his ſiſters, as his next of kin, were entitled thereto.

The relators inſiſted, that under the ſaid will they were entitled to all the reſidue of the ſaid teſtator's perſonal eſtate at the time of his death (except what was ſpecifically bequeathed); and that the teſtator, after making his will, received the money due on ſeveral of the ſecurities particularly mentioned in the will,

will, and placed out the money, and other money he had ſaved at intereſt, on other ſecurities, and which remained due and unreceived at his death; that all the money that remained due thereon at his death, was and ought to be deemed to paſs as part of the reſidue of his perſonal eſtate by and under his will, and that the relators ought to have the benefit thereof.

The cauſe came on to be heard on the 7th and 8th days of *November* 1769, and ſtood for judgment till this day (*a*):

(*a*) 15 Nov. 1769. (Reg. Lib. A. fol. 111.)

When Lord *Camden* C. declared the will well proved, &c. and directed the charitable truſts therein to be eſtabliſhed and carried into execution; and directed *Sarah Parkin* to ſurrender the copyhold eſtate compriſed in the will to ſuch truſts, and uſes as the teſtator had thereby directed, and declared the defendants, the teſtator's ſiſters, were entitled to the clear reſidue of his perſonal eſtate.

And declared that, with reſpect to ſuch of the ſeveral debts bequeathed to the relators, as were paid unto the teſtator between the time of making his will and his death, be ſuch payments voluntary, or compulſory, the ſame were not adeemed by ſuch extinction of theſe debts, but ought to be ſatisfied out of the teſtator's general eſtate.

The decree then goes on to direct an account of the teſtator's perſonal eſtate not ſpecifically bequeathed, and of his debts, funeral expences, and legacies; and in ſuch account the Maſter was to compute intereſt on ſuch of the ſeveral debts bequeathed to the relators remaining unpaid at his death, as carried intereſt, after the rate of the intereſt they carried. And the Maſter was to give credit to the relators for all ſuch ſums

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ſums of money as ſhould appear to have been paid the teſtator before his death, by any of the debtors, on the ſeveral ſecurities ſpecifically bequeathed to the relators, and the intereſt thereof as aforeſaid; and for that purpoſe the Maſter was to compute intereſt on ſuch of the ſpecific legacies as ſhould appear to have been paid to the teſtator before his death, at the rate of 4 *per cent. per ann.* from a year after the teſtator's death; and it was ordered, that what ſhould be coming for intereſt of ſuch of the debts ſpecifically bequeathed as were at that time ſtanding out, together with intereſt at 4 *per cent.* on ſuch of the debts as had been paid in as aforeſaid, ſhould be applied in the firſt place in payment of the aforeſaid two annuities of 60 *l.* and 16 *l.* to the teſtator's ſaid two ſiſters, the defendants *Sarah* and *Grace*; and that the ſurplus ſhould be paid into the Bank, ſubject to further order.

And the relators were to lay a ſcheme before the Maſter for carrying the charity into execution.

Coſts to be paid out of the eſtate, and liberty to apply.

Howel v. *Howel.*

CAUSE heard at the Rolls. The decree appealed. The cauſe heard on the appeal: afterwards appeal reheard by Lord *Camden* C., though at firſt objected to as againſt rule.

Reynoldſon

Reynoldſon v. *Perkins.*

6 Dec. 1769. See Ambl. 564.

OBJECTION at the hearing that remainder-men were not parties.

Lord *Camden* C.—Where the firſt tenant in tail is a party, it is not neceſſary to make any other of the remainder-men parties, and they will be bound by the decree.

Denn v. *Ruſſel.*

7 Dec. 1769.

A pauper can have no more than pauper's coſts.

THE defendant was a pauper: the bill was diſmiſſed *with coſts* for want of proſecution.

The defendant, as ſoon as he had obtained the order for diſmiſſion, gets the pleadings ſtamped, and pays Counſel, and others divers fees: And carries in his bill to be taxed, which the Maſter taxes.

The plaintiff takes exceptions, which came on to be argued.

The queſtion was, whether the plaintiff ſhould pay ſuch increaſed coſts.

Lord *Camden* C. and Sir *Thomas Sewel* M. R. were both of opinion, that the defendant was entitled to ſuch fees as he had paid, and what he had diſburſed at the time of the order, and no more; and therefore allowed the exceptions.

Berret

13 Dec. 1769.
6 Bro. P. C. 364.
S. C.

Intereſt refuſed on the balance of a mutual account, and held to be a ſimple contract debt.

Borret v. *Goodere.*

THIS cauſe ſtood this day for judgment on an appeal.

Lord *Camden* C.—The queſtion before me relates to intereſt.

The demand is, a balance of an open and mutual account, and on ſimple contract, as all the particulars are on ſimple contract. Indeed if the account had conſiſted of particulars, ſome whereof had been ſpecialty and ſome ſimple contract; yet the balance found due would be a ſimple contract debt.

And there is no inſtance where intereſt is given on an open mutual account, without ſome particular circumſtances; and it would be unjuſt to turn it into the nature of a ſpecialty, ſo as to carry intereſt.

If intereſt is claimed from the time the debt became due, or from the filing of the bill, there muſt be ſhewn an unjuſt detention of the debt: but that is not proved in this caſe: neither fraud, nor truſt, nor any proof that intereſt has been made of the balance.

If any part had carried intereſt, the Maſter ſhould in the account have computed intereſt; and if the Maſter had refuſed to compute intereſt duly, that would have been a matter of exception.

Here I am precluded by the report from ſaying intereſt ſhould be paid for any part of the balance; and if intereſt were preſumed to be made on the balance of an open account, it would lead to miſchief.

But if it is proved, the conſequence is plain: if it is preſumed, it muſt be under particular circumſtances; for

for the balance of an open mutual account doth not, nor ought it, to carry intereſt. *Borret* v. *Goodere.*

Such is the preſent caſe; and therefore I am of opinion it doth not carry intereſt.

Jeffery v. *Bowles.*

(Reg. Lib. A. fol. 267.)

17 March 1770. Truſler v. Comyns, 11 May 1773. The like decreed in Carnan v. Bowles, 24 Nov. 1785.

INJUNCTION to ſtay the printing of a book. On ſhewing cauſe to continue the injunction, it was referred to the Maſter to ſee if the books publiſhed by the plaintiff, and defendant were the ſame, or in what reſpect they differed.

Wharton and his wife and children v. *Maſſey.*

16 May 1770.

(Reg. Lib. B. fol. 280.)

A ſurviving truſtee of funds abſconds: the Court directs the dividends of thoſe funds to be paid to *ceſtui que vie.*

UPON the marriage of the plaintiff *Thomas Wharton* the elder, with *Judith* his late wife, 1000 *l.* old, and 1000 *l.* new South Sea annuities, by indenture dated the 22d of *May* 1757, were veſted in *Dudley Baxter*, ſince dead, and the defendant *Maſſey*, upon truſt to pay the dividends to the plaintiff *Thomas* the father for life, to his wife for life; and after the death of the ſurvivor, to the uſe of the children of the marriage.

The marriage was had, and the wife died, leaving the plaintiffs her children her ſurviving. *Baxter* being dead, and the defendant *Maſſey* having left the kingdom to avoid his creditors, the plaintiffs file their bill to reſtrain

Wharton et al. v. *Maſſey*.

reſtrain *Maſſey* from transferring the funds or receiving the dividends, and on the 18th of *July* 1768, obtained an order for that purpoſe.

Soon after the marriage, the ſaid *Baxter* and *Maſſey* executed a letter of attorney to *William Pimlet* to receive the dividends, and to pay them to the plaintiff the father. *Pimlet* received and paid the dividends till *November* 1761, when he died; and the authority thereby ceaſing, the South Sea Company refuſed to permit the plaintiff *Thomas Wharton*, the *ceſtui que vie*, to receive the dividends.

The defendant *Maſſey* ſtill abſconding, and the dividends being conſiderably in arrear, the plaintiff *Thomas Wharton* the father this day applied, that the South Sea Company might pay him the dividends, and ſiſhed for the opinion of the Court in reſpect to transferring the capital to the Accountant General. But Lord *Camden* C. was clear it was impracticable: that the transfer could only be by *Maſſey* perſonally or by attorney, and ſeemed to apprehend the plaintiff was without remedy; and at firſt doubted as to ordering the dividends; but at laſt he made the order, and put the caſe of a ſequeſtration iſſued againſt the defendants, or of a receiver's having been appointed; the order directing him to receive would have been an authority, and indemnity.

And upon reading the ſettlements, and the ſaid order of the 18th of *July* 1768, the Six Clerk's certificate, and an affidavit of the facts, his Lordſhip, after a pauſe, having at firſt a doubt, ordered the South Sea Company to permit the plaintiff *Thomas Wharton* the father, to receive the dividends and future dividends of the truſt annuities (*a*).

(*a*) Burke v. Bank of England, 18 April 1774, a ſimilar order.

Gaſcoine

JSN JAD NBJ
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